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In The

Supreme Court of the United States

October Term, 1996

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

and

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, ET AL.,

Intervenors.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals incorrectly deferred to EPA in accepting that agency's interpretation of § 502(b)(6) of the Clean Air Act, thus requiring Virginia to change its standing law and upsetting a core function of state sovereignty despite the lack of clear Congressional intent to do so.

2. Whether the Title V mandates, sanctions, and enforcement provisions of the Clean Air Act, when viewed together as a statutory scheme, unconstitutionally commandeer the legislative processes of the States by compelling them to enact and administer a federal regulatory program that, *inter alia*, requires the States to waive their sovereign immunity from challenges to state permitting decisions, in violation of the Tenth Amendment and the principles embodied in *New York v. United States*, 505 U.S. 144 (1992).

3. Whether the Clean Air Act's draconian sanction provisions, which continue even after a federal permit program is imposed, are unconstitutional exercises of Congress' Spending Clause and/or Commerce Clause powers because (a) their sole purpose and effect is to coerce States into administering a federal regulatory program, and (b) they are "so coercive as to pass the point at which pressure turns into compulsion," *South Dakota v. Dole*, 438 U.S. 203 (1987).

LIST OF PARTIES BELOW

In accordance with Rule 14(b) of the Rules of the United States Supreme Court, the following is a list of the parties to the proceeding below:

The Petitioner was the Commonwealth of Virginia.

The Respondents were the Administrator of the Environmental Protection Agency and the Environmental Protection Agency itself.

Intervenors were the American Lung Association of Northern Virginia; the American Lung Association of Virginia; Audubon Naturalist Society; Clean Water Action; Friends of the Rivers of Virginia; James River Association; Mountain Heritage Alliance; Valley Concerned Citizens; Virginia Chapter of the Sierra Club; Virginia Consortium for Clean Air; Virginia Council, Trout Unlimited; Environmental Defense Fund; Kathleen F. Derricott; Clifton E. Derricott; Andre L. Brown; Caleata Johnson; and Gwen Hedgepath.

Amici Curiae were Virginia Manufacturers Association; Washington Legal Foundation; Ogden Martin Systems of Lancaster, Incorporated; Ogden Martin Systems of Alexandria, Incorporated; National Independent Energy Producers; Ogden Martin Systems of Fairfax, Incorporated; and Chesapeake Bay Foundation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Commonwealth of Virginia ("Commonwealth") hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated March 26, 1996, is reported at 80 F.3d 869 and is also set forth in the Appendix at App. 1. The July 12, 1996 order of the Court of Appeals denying the Commonwealth's Petition for Rehearing and Suggestion for Rehearing *In Banc*, with five judges voting to hear the case *in banc*, is set forth in the Appendix at App. 33. *Commonwealth of Virginia v. Browner*, No. 95-1052, slip op. (4th Cir. July 12, 1996).

JURISDICTION

The jurisdiction of this Court to issue a writ of certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Spending and Commerce Clauses of and the Tenth Amendment to the United States

Constitution, various provisions of the federal Clean Air Act ("CAA"), and § 10.1-1318 of the Code of Virginia (1950), as amended.

The Spending Clause, Article I § 8 of the United States Constitution, provides:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . .

The Commerce Clause, Article I § 8 of the United States Constitution, provides:

> The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes . . . .

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Title V of the CAA is found at 42 U.S.C. § 7661 through § 7661f, and is set forth in the Appendix at App. 35-67. Section 502(b)(6) of Title V, 42 U.S.C. § 7661a(b)(6), is of particular importance here. It requires the Administrator of the Environmental Protection Agency ("EPA") to promulgate regulations establishing the minimum elements for an approvable state operating permit program, including:

> Adequate, streamlined, and reasonable procedures . . . for expeditious review of permit actions . . . including an opportunity for judicial

> review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

The other CAA provisions involved in this case are 42 U.S.C. § 7413, 42 U.S.C. § 7509(b), and 42 U.S.C. § 7602(e), all of which are set forth in the Appendix at App. 68-76.

Section 10.1-1318(B) of the Code of Virginia is the Commonwealth's judicial review law for appeals of state air pollution permit decisions, which is set forth in the Appendix at App. 77.

STATEMENT OF THE CASE

As amended by the addition of Title V in 1990, the CAA mandates a national operating permit program for facilities that emit air pollution, and requires each State to run such a program within its borders. CAA § 502(d) (42 U.S.C. § 7661a(d)) (App. 43-45). To this end, Title V orders States, in no uncertain terms, to legislate and regulate according to Congressional and EPA directives: Each State "shall" enact and administer a Title V program. *Id.*

Title V and its implementing regulations found at 40 C.F.R. Part 70 set forth specific and detailed criteria that the State programs must meet, and each program must gain EPA's approval before it can be implemented. For approval, § 502(b)(6) of Title V provides that each State must enact legislation that affords judicial review in state court of state-issued operating permits to any person who

participated in the public comment period. CAA § 502(b)(6) (42 U.S.C. § 7661a(b)(6)) (App. 41-42); 80 F.3d at 876 (App. 13). Acknowledging that § 502(b)(6) could not mean literally what it says, EPA interpreted it to mean that States must, at a minimum, afford standing consistent with Article III jurisprudence of this Court.

That this direct Congressional command is mandatory and intended to commandeer the legislative and regulatory processes of the States is further evidenced by the means provided to force compliance. These means comprise the remainder of the statutory scheme challenged by the Commonwealth.

Noncomplying States are subjected to coercive pressures and are punished severely and continuously until they succumb. Specifically, Congress directed EPA to use several punitive sanctions and authorized it to initiate civil and criminal enforcement proceedings against the States and their officials. First, in areas deemed not in attainment for ozone, non-complying States will lose the majority of their federal highway construction funds and be denied federal approvals needed for highway construction projects, even those *funded solely with state monies*. CAA § 179(b)(1) (42 U.S.C. § 7509(b)(1)) (App. 74-75). Thus, even if a State wished to forego federal funding, it could not expend its own funds for any project needing federal approval. The Commonwealth estimates that the highway funding ban would result in a loss of approximately one billion dollars in federal funds over a three-year period in its three nonattainment areas.[1]

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[1] This estimate was made at the time the Commonwealth filed its Petition for Review with the Court of Appeals.

The highway funding and approval sanctions would cripple the Commonwealth's highway construction program in the three most populated areas of Virginia: the Northern Virginia, Richmond Metropolitan, and Hampton Roads areas.

Second, the States would suffer an "offset" sanction that would require them to impose a 2-for-1 pollution reduction condition on *construction* permits (as opposed to operating permits), which would effectively end industrial development in nonattainment areas.[2] CAA § 179(b)(2) (42 U.S.C. § 7509(B)(2)) (App. 76). While the 2-for-1 offset requirement would be imposed on industry and not on the non-complying State, the sanction nonetheless is leveled at the State. For example, if the offset sanction were imposed in Virginia, it would be done so as a direct result of the Commonwealth's refusal to conform. The sanction would coerce the Commonwealth through economic disruption and pressure exerted on it by those citizens and industry affected.

In addition, Title V instructs EPA to develop and enforce a federally run program within the non-complying State as a temporary measure to fill the "gap" in time until the overwhelming impact of the sanctions forces the

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[2] For example, for *each ton* of pollutant a permit applicant plans to emit, the applicant would have to provide a corresponding *two ton* reduction through some other means as an "offset." The State would have to include this offset sanction "condition" in all construction permits issued prior to the commencement of construction initiated pursuant to other state regulations. The "condition" would later be memorialized in each facility's operating permit that would be issued after construction is completed.

State to run the program itself. CAA § 502(d)(3) (42 U.S.C. § 7661a(d)(3)) (App. 45). In order to keep the pressure on – *for the dual purpose of coercion and punishment* – the highway funding and approval sanctions and the offset sanction remain in full force even *after* the federally run program is in place.

Civil and criminal enforcement under § 113 of the CAA is the final coercive component of the challenged statutory scheme that EPA has at its disposal to force State cooperation. 42 U.S.C. § 7413 (App. 69-70). The CAA authorizes EPA to issue enforcement orders and to bring suit for injunctive and penalty relief against "any person" for any violation of Title V. CAA § 113(a)(3) and § 113(b) (42 U.S.C. § 7413(a)(3) and § 7413(b)) (App. 69-70). "Person" is defined in the CAA to include States and their officials. CAA § 302(e) (42 U.S.C. § 7602(e)) (App. 77). Thus, § 113 would cover any violation by a State of the requirement to enact an operating permit program. EPA also can employ § 113(b) to compel a non-complying State to enforce the federally imposed Title V plan.[3]

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[3] The Court of Appeals misapprehended the Commonwealth's argument regarding § 113 of the CAA. That court focused only on subsections (1) and (2) of § 113(a), and did not consider EPA's enforcement power found in subsections (a)(3) and (b) of § 113, 80 F.3d at 881 (App. 25). Furthermore, neither the Court of Appeals nor EPA ever addressed the Commonwealth's additional argument that § 113 can be, and has been, used to force States to enforce a federally imposed program. *Cf. Pennsylvania v. EPA*, 500 F.2d 246, 261 (3d Cir. 1974) (EPA "acted within the federal commerce power in requiring the Commonwealth to enforce [EPA's] transportation plan").

As a result of the passage of Title V, the Commonwealth has had to adopt and amend statutes, to promulgate regulations, as well as to spend millions of dollars preparing to implement the federal Title V program. The Commonwealth – along with most other States – has in essence given in to most of this compulsory federal micromanagement in order to retain its ability to regulate Virginia industry and protect its air quality. It has worked hard and in good faith to obtain EPA approval and to avoid the onerous sanctions awaiting those States who fail to secure EPA's approval or who dare to defy the federal mandates.

The Commonwealth, however, drew the line at the Congressional mandate that it expand the jurisdiction of its courts to hear challenges to state air permit decisions by *any* person who participated in the public comment process. Primarily because of this refusal, EPA rejected the Commonwealth's Title V program on December 5, 1994. 59 Fed. Reg. 62,324.[4] In order to obtain its approval, EPA continues to demand that the Virginia General Assembly alter its standing statute to open Virginia courts to persons who currently do not satisfy the state standard.[5]

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[4] EPA listed a total of five reasons for disapproving Virginia's operating permit program. 59 Fed. Reg. 62,324. Pursuant to discussions with EPA, all of the remaining "deficiencies" have been corrected and the Commonwealth resubmitted its program to EPA for a third time on September 10, 1996.

[5] Any such expansion necessarily involves an expanded waiver of the Commonwealth's sovereign immunity to allow a broader range of suits against state agencies in state courts. This case, therefore, presents the question raised by Justice Powell in his dissent in *FERC v. Mississippi*, 456 U.S. 742, 772 (1982) and avoided by the majority in that case. *Id.* at 769, n.31 and at 770, n.33 and n.34.

On January 9, 1995, the Commonwealth filed a petition for review in the Court of Appeals for the Fourth Circuit, pursuant to § 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1). The petition challenged EPA's disapproval based on its conclusion that the Commonwealth must expand the jurisdiction of its courts, arguing that EPA's interpretation of the Title V standing provision was erroneous. The Commonwealth also challenged all of the disapproval reasons on the basis that Title V's substantive mandates and the severe sanctions – when viewed together as a single statutory scheme – unconstitutionally commandeer the legislative processes of the Commonwealth to enact and administer a federal regulatory program, in violation of the Tenth Amendment to the United States Constitution and in conflict with this Court's ruling in *New York v. United States*, 505 U.S. 144 (1992). The Commonwealth also argued that the highway sanction itself, as applied in the Title V context, violates the Spending Clause because it passes the point where financial inducement turns into compulsion, as prohibited by this Court in *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

On March 26, 1996, the Court of Appeals denied the Commonwealth's petition, holding that each of the Title V sanction provisions, standing alone, were constitutional exercises of Congress' Spending and Commerce Clause powers. App. 28-29. On July 12, 1996, the Court of Appeals denied the Commonwealth's Petition for Rehearing and Suggestion for Rehearing *In Banc*, although five judges – Judges Russell, Widener, Wilkins, Luttig, and Williams – voted to hear the case *in banc*. App. 34.

Because the Commonwealth has failed to bend to the federal will, EPA is now preparing to implement a

federally run permit program in Virginia.[6] Such implementation, however, will do nothing to alter or delay the application of the sanctions described above.[7]

REASONS FOR GRANTING THE WRIT

Rule 10(c) of the Rules of this Court provides that a writ of certiorari will be granted only when there are compelling reasons for doing so. These include situations in which a federal court of appeals has decided an important federal question (1) which has not been, but should be, decided by this Court, (2) in a way that conflicts with relevant decisions of this Court, or (3) in a way that conflicts with other federal circuit courts.

This case presents several such questions, any one of which meets the foregoing criteria. Title V represents a shift in Congress' approach to regulating air pollution, and depicts a not-so-subtle move towards outright federal dictation to and coercion of the States.

In *New York v. United States*, this Court struck down a federal statute as violative of the Tenth Amendment and drew a line beyond which Congress could not go in "commandeering" state governments to carry out federal

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[6] EPA and the Commonwealth are currently negotiating a delegation agreement under 40 C.F.R. Part 71 whereby the Commonwealth would serve as an EPA "contractor" and operate the federal program for EPA.

[7] Before imposing sanctions, EPA must issue a rule to determine which sanction to impose first. CAA § 179(b) (42 U.S.C. § 7509(b)) (App. 74-76). Thus, no sanctions have been imposed in Virginia yet.

programs. The Court of Appeals in the present case has eliminated and rejected any meaningful application of the *New York* decision. By examining the sanctions faced by the Commonwealth piecemeal instead of stacked together as they are actually imposed, the Court of Appeals erroneously minimized their impact and thereby failed to apply *New York* correctly. 80 F.3d at 881 (App. 28-29). By characterizing the sanctions as "inducements" rather than coercion, the Court of Appeals also discarded this Court's most recent Spending Clause jurisprudence reflected in *South Dakota v. Dole*. 80 F.3d at 882 (App. 28).

This case squarely presents critical issues regarding the nature of the federal system. It tests the extent of constitutional limitations placed by *New York* and *Dole* on the power of the federal government to dictate to the sovereign States and to force them – under pain of multiple and severe sanctions – to implement federal programs. This Court's answer to these questions will provide pivotal guidance for both Congress and the States who must work together within the federal framework.

I.

The Court of Appeals Improperly Deferred to EPA's Interpretation of § 502(b)(6) Even Though Congressional Intent Is Unclear and That Interpretation Intrudes Upon State Sovereignty In Violation of *Gregory v. Ashcroft*

The Court of Appeals treated the statutory issue in this case as though it were merely a matter of interpreting § 502(b)(6) of the CAA and nothing more. Following this Court's ruling in *Chevron, U.S.A. v. Natural Resources*

Defense Council, 467 U.S. 837 (1984), it simply deferred to EPA's interpretation. 80 F.3d at 878 (App. at 17-18). It thus overlooked the constitutional ramifications of EPA's interpretation and its impact on state sovereignty.

In so doing, the Court of Appeals erroneously determined that this Court's more recent and controlling decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), did not apply in this case. Where Congressional intent is unclear, *Gregory* requires that courts not defer to an agency's interpretation if that interpretation would intrude on a state sovereign prerogative. Because Congressional intent in this case is not clear and EPA's interpretation intrudes on a fundamental state prerogative, the agency's interpretation is not entitled to deference.[8]

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[8] In *Gregory*, this Court was asked to decide whether, pursuant to the federal Age Discrimination in Employment Act ("ADEA"), state-appointed judges were protected from a Missouri State requirement for mandatory retirement at age 70. Missouri argued that the judges were not included under the ADEA because they fall with an exception for "appointee[s] on the policymaking level." The Court found that the extension of the ADEA to state employees was a valid exercise of Congress' Commerce Clause powers, and that all state employees were covered by the Act except those who fell within one of the exceptions. 501 U.S. at 467. The Court determined, however, that the ADEA was ambiguous regarding whether state judges fell within the exception of an "appointee on the policymaking level." *Id.* Thus, this Court concluded Congress' intent to cover state judges in the ADEA was ambiguous. *Id.* at 470. The Court held that, "[i]n the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Id.*

A.

EPA's Interpretation Is an Acknowledged Administrative Invention

At the outset of this dispute, both EPA and the Commonwealth agreed on at least one thing: The words in § 502(b)(6) should not be read literally. Under its plain meaning, the provision requires States to afford standing, regardless of injury to any person who participated in any way in the public comment process for the issuance of a state permit. EPA recognized that even federal judicial standing cannot go so far and is limited by the requirements of Article III of the United States Constitution, as interpreted by this Court.

Nonetheless, EPA decided to interpret § 502(b)(6) as requiring the equivalent of Article III standing without any basis in either the law itself or its legislative history. Having done so, EPA determined to force States such as the Commonwealth to provide such standing for their Title V programs or face disapproval of those programs. The Court of Appeals mechanically declared this interpretation reasonable and a "safe harbor," affording it *Chevron* deference. *Id.*

B.

Gregory Precludes Automatic Deference to EPA When State Sovereignty Is Threatened

Under different circumstances, EPA's action might be entitled to *Chevron* deference. In many cases involving the interpretation of a federal statute, there are no implications for the balance of federal-state power. In those situations, judicial review is appropriately deferential to

the interpretation of the agency charged with implementing the statute. By contrast, where – as here – an interpretation would displace or intrude into some essential core function of state sovereignty, this Court requires a clear statement of legislative intent before accepting such an interpretation. Ambiguity will not do. *Gregory*, 501 U.S. at 464.[9]

In *Gregory v. Ashcroft*, this Court recognized that an essential component of a healthy federal structure is a balance of power between federal and state sovereigns. In addressing issues affecting fundamental aspects of state sovereignty, therefore, " 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" that balance. 501 U.S. at 460 (quoting *Atascadero State Hospital*, 473 U.S. at 243). "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must do so unmistakably clear in the language of the statute." 501 U.S. at 460 (internal quotations omitted). Where Congressional intent is ambiguous, this Court has instructed the courts "not [to] attribute to Congress an intent to intrude on state governmental functions." 501 U.S. at 470.

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[9] At the time *Gregory* was decided, this Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) had relegated the States' Tenth Amendment protections essentially to the political process. The "plain statement rule" was derived from this Court's Eleventh Amendment jurisprudence typified by *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and was designed by this Court to protect the rights of the States and to prevent circumvention of the political process through judicial (and certainly through administrative) interpretation of ambiguous legislation.

Below, the Court of Appeals addressed the Commonwealth's *Gregory* argument only briefly. It determined that *Gregory* did not apply to this case because, unlike the facts in *Gregory*, there is no question that the "plain meaning" of § 502(b)(6) shows that it applies to state courts. That statement of the obvious begs the question: Did Congress intend, through the application of § 502(b)(6), that States waive their sovereign immunity and expand their standing laws to hear a broader range of challenges to state-issued permits in state court than may be currently authorized by state law?[10]

The Commonwealth has never disputed that § 502(b)(6) applies to state courts. The provision is undisputedly ambiguous, however, regarding Congress' intent to force states to adopt a different judicial review standard, and it is altogether silent on whether the federal Article III standard should apply.

Furthermore, access to state courts is a core element of a State's sovereignty. The Court of Appeals conceded as much. 80 F.3d at 879 (App. at 19-20). Any expansion of standing to sue a sovereign in its own courts constitutes a waiver of that sovereign's immunity. It is difficult to imagine a more essential element of sovereignty than the ability to control the acts for which the sovereign itself

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[10] The Court of Appeals' perfunctory acknowledgment of *Gregory* produces an absurd result. Since the plain statement requirement of *Gregory* applies only when a federal law threatens to impact a function of state sovereignty, any statute examined in light of that ruling must of necessity apply to a state. The Court of Appeals chose not to apply *Gregory* to the very type of situation for which it was designed.

can be held judicially accountable in its own courts. In *Gregory*, the state governmental function at issue involved the qualifications of state court judges, which the Court described as "a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." 501 U.S. at 460. In the present case, the issue involves equally fundamental aspects of state sovereignty: the jurisdiction of state courts and the States' right to decide by whom they may be sued.

Despite this, the Court of Appeals brushed aside *Gregory*. In so doing, it allowed EPA, in clear contravention of *Gregory*, to administratively interpret § 502(b)(6) in such a way as to intrude into the core sovereignty of the Commonwealth.

C.

If the Court of Appeals Had Correctly Applied *Gregory* to EPA's Interpretation of § 502(b)(6), the Latter Would Necessarily Have Been Set Aside

Had the Court of Appeals applied the clear statement requirement of *Gregory* correctly, it would have declined to defer to EPA's interpretation of § 502(b)(6). Instead it would have looked for a clear statement of whether the statute was intended by Congress to apply in the particular manner claimed by EPA. *See Gregory*, 501 U.S. at 460-70. Had it done so, it would necessarily have concluded that no such statement of Congressional intent exists. The Court of Appeals should have ruled that EPA's

interpretation of the statute improperly attributes to Congress the intent to interfere with the usual constitutional balance by dictating to the Commonwealth who must be provided access to state courts. Furthermore, the Court of Appeals should have directed EPA to interpret § 502(b)(6) consistently with state law. The Commonwealth suggested such a solution, but the Court of Appeals rejected it. 80 F.3d at 877-78 (App. at 17-18).

EPA's interpretation improperly creates a constitutional issue rather than avoiding one and thereby violates the guiding principle of *Gregory*. Because Congress has not spoken in unmistakably clear terms on this issue, EPA's interpretation is unquestionably arbitrary, capricious, and not in accordance with law. It should have been and must be set aside.

II.

The Court of Appeals Improperly Applied *New York v. United States* by Failing To Analyze the Mandatory Language of Title V and the Overall Impact of the Statutory Scheme

The Court of Appeals evaded the Tenth Amendment issue in this case by ignoring the mandatory language of Title V, by dividing the challenged statutory scheme into discrete provisions, and by examining each without analyzing the workings of the whole. While other constitutional flaws exist, it is the combined force of these provisions, which are cumulative and applied simultaneously, that most offends the Tenth Amendment. The Title V mandates and the sanctions and enforcement provisions of the CAA *together* form an increasingly common

statutory scheme that unconstitutionally coerces States into enacting and administering a federal regulatory program. As such, it violates the Tenth Amendment and the principles embraced by this Court in *New York*.

A.

The Challenged Statutory Scheme Commandeers the Legislative Processes of the States

This Court in *New York* sent a clear message to Congress that its power to require the States to do its bidding has limits: Congress simply cannot " 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " *New York*, 505 U.S. at 161 (quoting *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 288 (1981)). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." 505 U.S. at 162.

The Title V scheme of direct commands backed by severe penalties is exactly the type of Congressional overreaching this Court rejected in *New York*. Title V's clear intent is to commandeer the legislative process of the States to enact and administer a federal operating permit program. The Court of Appeals, however, failed to recognize this fact because it engaged in virtually no Tenth Amendment analysis.

In sidestepping the central issue in this case, the Court of Appeals chose to analyze the sanctions provisions individually and solely under the Spending and Commerce Clauses – without regard for the CAA's direct mandates or for the operation of the statute as a whole –

to determine whether the CAA was constitutional. 80 F.3d at 880-81. (App. 25-26) ("The CAA is constitutional because, although its sanctions provisions potentially burden the states, those sanctions amount to inducement rather than 'outright coercion.' "). In doing so, the Court of Appeals erroneously assumed that the direct mandates would be constitutional so long as each sanction, individually, was a constitutional exercise of Congress' powers. This assumption, however, disregards this Court's holding in *New York* that Congress simply may not order the States to enact or enforce a federal regulatory program. *See New York*, 505 U.S. at 169-70. Several courts of appeals have relied on *New York* to strike down federal statutes that direct States to adopt and administer federal programs. *Association of Community Orgs. for Reform Now v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. July 22, 1996) (No. 96-174) (striking down a portion of the Lead Contamination Control Act of 1988 under the Tenth Amendment); *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996), *petition for cert. filed, United States v. Gonzalez*, 65 U.S.L.W. 3001 (U.S. June 19, 1996) (No. 95-2052) (striking down a portion of the Brady Act under the Tenth Amendment);[11] *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993) (striking down a

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[11] This Court has granted certiorari in two cases consolidated below in the Ninth Circuit Court of Appeals that address the constitutionality of the Brady Act. *Printz v. United States*, 66 F.3d 1025 (9th Cir. 1995), *cert. granted*, ___ U.S. ___, 116 S. Ct. 2521 (1996). A third petition dealing with this issue was also filed in 1996. *Frank v. United States*, 78 F.3d 815 (2d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3053 (U.S. June 23, 1996) (No. 95-2006).

portion of the Forest Resources Conservation and Shortage Relief Act under the Tenth Amendment).

As discussed below, the only plausible construction of the Title V mandates is that it was Congress' plan to make the States, and not the federal government, enact and enforce the federal Title V program. The sanctions and other coercive measures are the means Congress uses to force States to do so. Because the Court of Appeals' decision is inconsistent with this Court's decision in *New York* and the decisions of other federal Circuits in closely related contexts, the Court should grant certiorari.

B.

The Sanctions and Other Coercive Measures Used To Force State Compliance Violate the Tenth Amendment and Are Impermissible Exercises of Congress' Spending and Commerce Clause Powers

The Court of Appeals' analysis was fundamentally flawed in another way. The court ignored the cumulative and continuing nature of the CAA sanctions and the extremely coercive force generated collectively by them. As a result, the court entirely missed one of the Commonwealth's central claims: that the unprecedented stacking of different sanctions, the effect caused by the interaction among them, and EPA's authority to proceed civilly and criminally against a State – *together* – inflict impermissibly coercive pressure on the States with the *sole* purpose of commandeering State governmental processes, in violation of the rule of *New York*.

This Court has identified two "methods . . . by which Congress may urge a State to adopt a legislative program

consistent with federal interests." *See New York*, 505 U.S. at 166. First, the federal government may induce state action by placing conditions on the State's receipt of federal funds, so long as the condition imposed has a reasonable relationship to the purpose of the expenditure, and the financial pressure induces rather than coerces. *See, e.g., Dole*, 483 U.S. at 211. Second, the federal government may offer States the choice between enacting the federal regulatory scheme or being preempted by federal regulation. *See, e.g., Hodel*, 452 U.S. at 282.

In Title V, however, Congress went far beyond these methods. The CAA mandates State regulation and then brings all of its various pressures to bear simultaneously in a finely orchestrated assault designed solely to compel State compliance. The highway construction funding and approval sanctions, the offset sanction, and the imposition of a federally run operating permit program are mandatory. EPA must impose these sanctions on non-complying States within certain deadlines, although it may do so earlier. 80 F.3d at 873, n.2 (App. 6, n.2); *Commonwealth of Virginia v. United States*, 74 F.3d 517, 520-21 (4th Cir. 1996). These sanctions operate cumulatively and, for all practical purposes, simultaneously. *See id.* All are imposed within a matter of a few months – one being added on top of another. As provided in § 113 of the CAA, EPA also has the option at the same time the sanctions are in place to take administrative, civil, and criminal action against a non-complying State and its officials.

The layering on of sanctions with federal preemption creates pressures far more coercive than any of these measures considered alone, a fact the Court of Appeals

failed to recognize. Because of their *coordinated* and *cumulative* coercive effect, a State exercising its Tenth Amendment right not to enact a federal program is struck several different ways at once: the simultaneous loss of federal highway construction funds and the ability to expend state highway funds, the stagnation of industrial and economic growth and the dislocation of its citizens' economic livelihood through the offset sanction, and the intrusion of a federal regulatory program.[12]

The Court of Appeals also grossly underestimated the coercive nature of the challenged statutory scheme by dismissing out-of-hand the Commonwealth's arguments regarding the offset sanction and § 113. As noted above, the court analyzed each component of the scheme individually, and not as part of the whole. It therefore completely missed the point that, in concert with the other sanctions, the offset sanction and § 113 are intended to coerce States into compliance, thus intensifying the pressure on those States. See Part IV, *supra*.

Furthermore, the continuation of sanctions *after* a federally run program is in place serves only one purpose, which is an illegitimate one: to coerce the States into foregoing their right *not* to regulate. This Court in *Hodel* and other similar cases has recognized Congress'

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[12] For example, for failing to enact the federal program, the Commonwealth will be stopped from building or repairing the majority of its roads in its three most populated areas. At the same time, the Commonwealth will itself be required to impose a permit condition on industry that will greatly inhibit economic growth in the same areas. Concurrently, EPA will impose an operating permit program in Virginia.

authority to pursue substantive federal regulatory interests through preemption while honoring States' Tenth Amendment right to "abandon[] regulation of the field altogether," *FERC v. Mississippi*, 456 U.S. at 766. That situation does not exist here, however. Assuming *arguendo* that the CAA sanctions are needed to control the increase in pollution caused by a State's failure to enact a Title V program, that need would vanish once the federal government operates a Title V program in that State because presumably EPA's program would then control the increased pollution. At that point, any legitimate federal interest in controlling air pollution is wholly exhausted. The only possible interest served by the *continuation* of the highway funding and approval sanctions and the offset sanction is to punish States for not having *themselves* enacted the federally dictated scheme – an interest that the Tenth Amendment condemns as illegitimate and that is an impermissible use of Congress' Spending and Commerce Clause powers.

Because of the serious impact on federal-state relations, the principles underlying the *New York* anti-coercion rule must apply with heightened force where sanctions are stacked and are used to coerce States to enact and administer a federal program. The coercive measures used to force State compliance with Title V violate the Tenth Amendment, and are impermissible exercises of Congress' Spending and Commerce Clause powers. For these reasons, the Court should grant certiorari.

III.

The Court of Appeals Failed to Apply This Court's Ruling in *South Dakota v. Dole* in any Meaningful Way

Consistent with the overall pattern that emerges from the opinion below is the determination not to give significant effect to this Court's most recent ruling on Congress' exercise of its Spending Clause power. In doing so, the Court of Appeals avoided any principled analysis of the limiting language set forth by this Court in *Dole*. Such judicial reluctance has resulted in Congress and federal agencies finding it easier to use the Spending Clause to circumvent constitutional limitations imposed by the Tenth Amendment, such as those established in *New York*. Congress simply uses its Spending Clause power and, by threatening to reduce federal funding, coerces States into doing the federal bidding, thereby accomplishing indirectly what this Court has forbidden to be done directly.

In this case, the cutting off of highway construction funds is the most draconian element of the challenged scheme. As used in the Title V context, the funding sanction serves the sole purpose of forcing States, such as the Commonwealth, to implement a Title V program designed and approved by Congress and EPA. This particular sanction violates *two* of the *Dole* requirements: (1) that the financial penalty for non-compliance not be so coercive as to turn pressure into compulsion and (2) that the condition imposed be reasonably related to the purpose of the federal expenditure.

A.

The Highway Sanction as Employed in the Title V Context Is Coercive

In *Dole*, this Court indicated that Congress' spending power is not without limit.

> [I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion."

483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court of Appeals recognized and even quoted this rule. 80 F.3d at 881 (App. 26). But it performed only a superficial analysis of the impact of the highway construction funding sanction on the Commonwealth, quickly pronouncing it non-coercive. Whatever standard the court applied is not stated. In essence, it concluded that because some other courts have upheld funding restrictions that were "more severe," the Commonwealth's situation is not serious enough to warrant further review.[13] 80 F.3d at 881-82 (App. 27-28).

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[13] *Dole* itself and *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), both cited by the Court of Appeals, involved Congress' use of the Spending Power to cut off highway funds to States which refused to change their laws related to the minimum drinking age and to speed limits, respectively. *Dole* itself involved only a small percentage of highway funds. *Oklahoma v. Schweiker*, 655 F.2d 401 (D.C. Cir. 1981), another case cited by the Court of Appeals, involved Medicaid funding. The former two cases are distinguishable from the present one on their facts and in that they at least deal with a subject reasonably related to the purpose of the spending – highway construction. The last case is totally inapposite. Participation in the Medicaid program is a voluntary decision

The highway sanction should not have been dismissed so lightly. Without placing an exact number on the potential loss to the Commonwealth and its citizens, the Court of Appeals could and should have done more. As it acknowledged, the Commonwealth faces, *inter alia*, the loss of major highway funding for non-attainment areas. While there are exemptions for certain types of projects, building highways is a long-term, difficult and expensive process. Loss of highway funding – which means loss of money paid in the form of federal taxes by citizens of the Commonwealth – deals a blow to Virginia from which it may not recover. Highway construction delayed or lost runs into untold millions of dollars with each passing year. Plans unmade potentially cannot be remade, certainly not without increased expense and inordinate delay. Threats to highway safety and inconvenience of citizens in growing areas of the Commonwealth – those most directly affected – can reasonably be expected to result. Moreover, the impact on the economy of the affected area cannot be readily measured. Such losses almost certainly are irreparable.

The Court of Appeals disregarded all of these impacts and justified its conclusion that the highway sanction is not coercive by stating that the Commonwealth should have planned better for its anticipated noncompliance with Title V. 80 F.3d at 882 (App. 27). This cavalier attitude overlooks the fact that Virginia has been

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on the part of each State and failure to do so carries no federal sanctions. Moreover, Medicaid is a grant program, and the Commonwealth does not challenge any of the CAA grant programs.

working in good faith for many years with EPA in order to produce a mutually acceptable Title V program.

Unfortunately, the approach of the Court of Appeals is not unlike that taken by a number of federal courts since *Nevada v. Skinner* that have refused to apply *Dole* in any meaningful way. In *Skinner*, the Ninth Circuit effectively declared that judicial efforts to fashion a test for coercion as defined in *Dole* are fruitless.[14]

It apparently has become somewhat acceptable for lower federal courts to dismiss a challenge under *Dole* by using as partial justification the argument that no federal court has struck down a federal statute under the Spending Clause since this Court did so in *United States v. Butler*, 297 U.S. 1 (1936). 80 F.3d at 881 (App. 26-27); *Skinner*, 884 F.2d at 448; *see Virginia Dep't of Educ. v. Riley*, 86 F.3d 1337 (4th Cir., 1996), *reh'g requested* (Aug. 5, 1996). Where the constitutional balance between federal and state power is at issue, however, the judiciary must take on this difficult task. *See United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1639 (1995) (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our

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[14] Because *Skinner* pre-dates *New York*, its continuing validity is questionable. There the Ninth Circuit reasoned that if Congress has the constitutional authority to force States directly to comply with a federal directive it should be able to do so indirectly by withholding funds for failing to comply. 884 F.2d at 449. Since *New York*, Congress clearly does *not* have such authority.

constitutional structure and plays too vital a role in securing freedom for [the judiciary] to admit inability to intervene when one or the other level of Government has tipped the scale too far.")

At least one judge of the Court of Appeals below had no trouble concluding in another recent case that loss of a $60 million federal special education grant because of a dispute involving a handful of students presented a Tenth Amendment claim of the highest order and met the *Dole* test for coercion. *See* Circuit Judge Luttig dissenting opinion in *Riley*, 86 F.3d at 1347. Judge Luttig joined the dissent from the Court of Appeals' 8-5 refusal to rehear the present case *in banc*. App. 34.

The Commonwealth respectfully urges this Court to revisit the coercion test of *Dole* and its relation to *New York*. If *Dole* means what it says, then the lower courts must be directed to apply it consistent with, rather than in circumvention of, this Court's other rulings on issues having implications for relationships among sovereigns within the federal system. To allow the lower courts, as in this case, to pay mere lip service to the decision deprives it of all force and effect and does nothing to guide the respective sovereigns in attempting to adjust their relationships within the bounds of the law.

B.

The Condition Imposed on Highway Funding Under the CAA Is Not Reasonably Related To its Purpose

The Court of Appeals also erred in dismissing out-of-hand the Commonwealth's argument that the Spending Clause is violated where the condition placed on the

receipt of federal funds is not related to the federal interest served by the federal spending. *See Dole*, 483 U.S. at 208. In the Title V context, Congress has directed the States to enact and enforce a non-voluntary federal regulatory program as a condition for receiving federal monies routinely granted for a purpose unrelated to that federal program, that purpose being highway construction.

The condition imposed by the CAA – that States implement a Title V program for *stationary* sources of air pollution – is not reasonably related to the purpose of highway construction. *See Butler*, 297 U.S. at 73 ("There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."); *Dole*, 483 U.S. at 212, 215-18 (O'Connor, J., dissenting).

The Court of Appeals simply stated that air quality is a problem of federal interest and therefore any federal spending may be conditioned so as not to exacerbate air pollution. 80 F.3d at 882 (App. 28). As a result, the Court of Appeals characterized it as "of no consequence that a highway sanction, which will have the effect of reducing emissions from mobile pollution sources, is being used to induce compliance with a portion of the Act designed to reduce emissions from stationary sources." *Id.*[15] But it is

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[15] The Court of Appeals was wrong on all fronts. Factually, a decrease in highway spending can be demonstrated to *increase* emissions from automobiles by reason of increased traffic congestion. Moreover, Title V is a purely administrative

axiomatic that highway construction and the regulation of industrial air pollution are different programs with different purposes. The pollutants addressed by each are distinct, with distinct health and environmental consequences, and cannot be interchanged.

More significant, the Court of Appeals ignored the fact that other portions of the CAA and federal transportation statutes require that federal highway funds be used only in conformity with EPA-approved State Implementation Plans governing mobile pollution sources. Thus, any federal highway funds returned to the Commonwealth can be used only on those projects that have received federal approval from both a transportation and environmental perspective. In short, Congress has tied federal highway funds to State-adoption of Title V *not* to further any federal environmental interest, and *not* because there is any relationship between the two programs, but *solely* because highway funds represent one of the biggest weapons in Congress' arsenal to coerce States into compliance with federal dictates. This approach is even more troublesome where Congress has the direct power to implement a federal Title V program in those States that wish to exercise their Tenth Amendment right not to regulate on behalf of another sovereign, and, in particular, not to expand the jurisdiction of their own courts.

The analysis performed by the Court of Appeals stands in stark contrast to that employed by the majority of this Court in *Lopez*, another recent test of

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provision of the CAA and will not in itself do anything to reduce industrial pollution.

Congressional power. There this Court rejected the idea that Congress may assert apparently limitless power *based on sweeping* assertions about causal relationships. Broad assumptions such as these defy careful analysis of the matter at hand and render the protections afforded to the States by the Constitution and by decisions such as *Dole* and *New York* illusory.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

CAROL M. BROWNER,
Administrator, U. S. Environmental Protection Agency;
ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, AND AMERICAN LUNG ASSOCIATION OF VIRGINIA; CLEAN WATER ACTION; FRIENDS OF THE RIVERS OF VIRGINIA; THE JAMES RIVER ASSOCIATION; MOUNTAIN HERITAGE ALLIANCE; VALLEY CONCERNED CITIZENS; VIRGINIA CHAPTER OF THE SIERRA CLUB; VIRGINIA CITIZEN ACTION; VIRGINIA CONSORTIUM FOR CLEAN AIR; VIRGINIA COUNCIL, TROUT UNLIMITED; ENVIRONMENTAL DEFENSE FUND, INCORPORATED; KATHLEEN F. DERRICOTT; CLIFTON E. DERRICOTT; ANDRE L. BROWN; CALEATA JOHNSON; GWEN HEDGEPATH; AUDUBON NATURALIST SOCIETY,
Intervenors,

No. 95-1052

VIRGINIA MANUFACTURERS ASSOCIATION; WASHINGTON LEGAL FOUNDATION; OGDEN MARTIN SYSTEMS OF LANCASTER, INCORPORATED; OGDEN MARTIN SYSTEMS OF ALEXANDRIA, INCORPORATED; NATIONAL INDEPENDENT ENERGY PRODUCERS; OGDEN MARTIN SYSTEMS OF MONTGOMERY, INCORPORATED; OGDEN MARTIN SYSTEMS OF FAIRFAX, INCORPORATED; CHESAPEAKE BAY FOUNDATION,
Amici Curiae.

On Petition for Review of an Order of the United States Environmental Protection Agency.

Argued: December 4, 1995

Decided: March 26, 1996

Before MURNAGHAN and MICHAEL, Circuit Judges, and MICHAEL, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Petition for review denied by published opinion. Circuit Judge Michael wrote the opinion, in which Judge Murnaghan and Senior District Judge Michael joined.

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CHESAPEAKE BAY FOUNDATION, INC., Richmond, Virginia, for Amicus Curiae Chesapeake Bay Foundation.

OPINION

MICHAEL, Circuit Judge:

The Commonwealth of Virginia petitions for review of the Environmental Protection Agency's final action disapproving Virginia's proposed program for issuing air pollution permits. Specifically, Virginia challenges EPA's finding that Virginia has failed to comply with Title V of the 1990 Amendments to the Clean Air Act (sometimes "CAA" or the "Act"), CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f, because Virginia's proposal lacks adequate provisions for judicial review of the Commonwealth's permitting decisions. Virginia also challenges the constitutionality of Title V and its sanctions provisions, CAA §§ 179(b) & 502(d), 42 U.S.C. §§ 7509(b) & 7661a(d). According to Virginia, these provisions improperly commandeer the legislative processes of the states, in violation of the Tenth Amendment and the Spending Clause, U.S. Const. art. I § 8, cl. 1. We have jurisdiction over all of Virginia's claims, *see* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1), and we find them to be without merit.

I.

A.

Because Virginia claims that the EPA has misinterpreted Title V and that Title V is unconstitutional as well, a brief discussion of the statute's structure and purposes is in order.

Title V's key provision, CAA § 502, 42 U.S.C. § 7661a, prohibits major stationary sources of air pollution from operating either without a valid permit or in violation of the terms of a permit.[1] The permit is crucial to the implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source. *Clean Air Act Amendments of 1990: Chafee-Baucus Statement of Senate Managers* (Conf. Rep. No. 952, 101st Cong., 2d Sess.) ("*Chafee-Baucus Statement*"), *reprinted in* 136 Cong. Rec. S16933, S16983 (daily ed. Oct. 27, 1990). In a sense, a permit is a source-specific bible for Clean Air Act compliance.

Title V of the Act contemplates that states will administer and enforce the permitting program:

> [T]he permit program is predicated on the principle that the primary responsibility for its day-to-day administration will rest squarely with state and local air pollution agencies. While EPA has an important role of providing guidance and general oversight, the agency should not unduly interfere with states' implementation of the permit program.

Chafee-Baucus Statement at S16983.

States are directed to submit for EPA approval their own programs for issuing permits. CAA § 502(d)(1), 42 U.S.C. § 7661a(d)(1). EPA may not approve a proposed permit

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[1] A "stationary source" is defined in CAA §§ 112(a)(1), 182(b)(1)(A)(ii)(I), 182(c), 182(d), 182(e), 302(j), & 501(2); 42 U.S.C. §§ 7412(a)(1), 7511a(b)(1)(A)(ii)(I), 7511a(c), 7511a(d), 7511a(e), 7602(j), & 7661(2). Stationary sources, such as power plants and factories, are distinguished from mobile sources, such as automobiles.

program unless it meets certain minimum criteria set out in CAA § 502(b), 42 U.S.C. § 7661a(b). Among other things, states must design a standard permit application form (§ 502(b)(1)), adequately staff and fund the permit program (§ 502(b)(4)), develop a plan to ensure permit compliance (§ 502(b)(5)), provide public access to documents submitted in support of permit applications (§ 502(b)(8)), and provide for review in state courts of permitting decisions (§ 502(b)(6)).

If a state fails to submit a permit program, or submits a permit program that EPA disapproves for failure to comply with CAA § 502(b), the state becomes subject to sanctions designed to encourage compliance. CAA § 502(d), 42 U.S.C. § 7661a(d).[2]

One sanction deprives states of certain federal highway funds. CAA § 179(b)(1), 42 U.S.C. § 7509(b)(1). However, the state loses no funds that would be spent in regions that are in "attainment" within the meaning of the Act.[3]

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[2] We discuss the timing of sanctions in greater detail in our opinion in a related case, *Virginia v. United States* (*Virginia I*), No. 95-2229 (4th Cir. Feb. 2, 1996). Sanctions are mandatory, but they may be imposed earlier than mandated by the statute if EPA finds, after holding a notice-and-comment rulemaking proceeding, that early imposition of sanctions is necessary to encourage compliance. *See* CAA §§ 502(d) & (i), 42 U.S.C. §§ 7661a(d) & (i).

[3] We explain the concepts of "attainment" and "nonattainment" in greater detail in *Virginia I*. In brief, an area is in nonattainment with respect to a pollutant if levels of that pollutant in the ambient (breathable) air exceed a threshold level set by EPA. An ozone nonattainment area, for example, has what EPA has determined to be a sufficient amount of ozone in the air to cause health problems.

CAA § 179(b)(1)(A), 42 U.S.C. § 7509(b)(1)(A). And, even within "nonattainment" areas, funds remain available for highway projects that "resolve a demonstrated safety problem and likely will result in a significant reduction in, or avoidance of, accidents." *Id.* Finally, federal funds may be spent on many other types of transportation projects within nonattainment areas, including:

> (i) capital programs for public transit;
>
> (ii) construction or restriction of certain roads or lanes solely for the use of passenger buses or high occupancy vehicles;
>
> (iii) planning for requirements for employers to reduce employee work-trip-related vehicle emissions;
>
> (iv) highway ramp metering, traffic signalization, and related programs that improve traffic flow and achieve a net emission reduction;
>
> (v) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit operations;
>
> (vi) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use, through road use charges, tolls, parking surcharges, or other pricing mechanisms, vehicle restricted zones or periods, or vehicle registration programs;
>
> (vii) programs for breakdown and accident scene management, nonrecurring congestion, and vehicle information systems, to reduce congestion and emissions; and

> (viii) such other transportation-related programs as the [EPA] Administrator, in consultation with the Secretary of Transportation, finds would improve air quality and would not encourage single occupancy vehicle capacity. In considering such measures, the State should seek to ensure adequate access to downtown, other commercial, and residential areas, and avoid increasing or relocating emissions and congestion rather than reducing them.

CAA § 179(b)(1)(B), 42 U.S.C. § 7509(b)(1)(B).

A second sanction increases the pollution offset requirements already imposed on private polluters within ozone nonattainment areas. Normally, new major stationary sources of pollution may not be operated within nonattainment areas (and existing stationary sources may not be modified if the modification would increase emissions) unless pollution from other sources is reduced to offset increased pollution from the new or modified source. In regions of "marginal" nonattainment with respect to ozone, 110 tons of old pollution must be eliminated for every 100 additional tons of new pollution (a ratio of 1.1:1). CAA § 182(a)(4), 42 U.S.C. § 7511a(a)(4). In regions of "moderate" nonattainment, 115 tons of old pollution must be eliminated for every additional 100 tons of new pollution (a ratio of 1.15:1). CAA § 182(b)(5), 42 U.S.C. § 7511a(b)(5). In regions of "serious," "severe," or "extreme" nonattainment with respect to ozone, 120 tons of old pollution must be eliminated for every additional 100 tons of new pollution (a ratio of 1.2:1). CAA §§ 182(c)(10), (d), & (e); 42 U.S.C. § 7511a(c)(10), (d), & (e). In regions of "severe" and "extreme" nonattainment, higher ratios are mandated for certain pollutants. *See*

CAA §§ 182(d)(2) & (e)(1); 42 U.S.C. §§ 7511a(d)(2) & (e)(1). The sanction supersedes these normal ratios by increasing the ratio in all ozone nonattainment areas to 2:1, requiring 200 tons of old pollutants to be eliminated for every 100 tons of new pollutants allowed. CAA § 179(b)(2), 42 U.S.C. § 7509(b)(2). The offset sanction, therefore, could slow the rate of industrial development within a noncomplying state.

A third sanction eliminates the state's ability to manage its own pollution control regime. If the state does not gain approval for its permit program, EPA develops and implements its own Title V permitting program, within the noncomplying state. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3). The state is not required to do anything to assist EPA in this effort; the federal government becomes wholly responsible.

B.

Virginia submitted a proposed Title V permit program to EPA on November 12, 1993, and January 14, 1994. EPA then opened a notice and comment period. EPA published notice of its intent to disapprove Virginia's proposal on June 17, 1994, 59 Fed.Reg. 31183, and Virginia responded to EPA's notice. After considering Virginia's comments, as well as the comments of others, EPA took final action disapproving Virginia's proposed Title V program on December 5, 1994. 59 Fed.Reg. 62324.

EPA based its disapproval on five grounds:

> (1) the proposed program contained inadequate judicial review provisions, in violation of

> CAA § 502(b)(6) (42 U.S.C. § 7661a(b)(6)) and 40 C.F.R. § 70.4(b)(3)(x) & 70.7(h);
>
> (2) the proposed program would have allowed certain permits to be issued by default, in violation of § 505(b)(3) (42 U.S.C. § 7661d(b)(3)) and 40 C.F.R. § 70.8(e);
>
> (3) the regulations that would have implemented the proposed program had expired without being re-promulgated;
>
> (4) the proposed program did not "require issuance of permits to the proper universe of sources required by 40 CFR part 70"; and
>
> (5) the proposed program did not "contain regulations meeting the requirements of 40 CFR part 70 to ensure issuance of permits that contain all applicable Federal requirements," and did not "correctly delineate provisions only enforceable by" Virginia.

See id. at 62324-25.

Virginia filed a petition for review in this Court on January 9, 1995.[4] Since that date Virginia has revised portions of its original proposal and now claims that it has corrected defects (2) through (5). EPA has not yet determined whether those defects have actually been corrected.

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[4] Virginia simultaneously filed suit, *Virginia I*, in the district court for the Eastern District of Virginia. In *Virginia I* we affirmed the district court's decision to dismiss for lack of subject matter jurisdiction.

The claims in Virginia's petition to us fall into three broad categories. First, Virginia argues that because it has corrected defects (2) through (5) in its proposed permit program, we should remand the case to EPA for a new determination of whether the corrected version complies with the Act. Second, Virginia argues that EPA's disapproval of the originally proposed permit program was arbitrary and capricious. Third, Virginia argues that Title V of the CAA and its sanctions provisions are unconstitutional because the Act represents an attempt by Congress to coerce Virginia into exercising its sovereign legislative power. We consider each claim in turn.

II.

Virginia suggests that we must remand this case to EPA because four of the five defects in its originally proposed Title V state permit program have been corrected. We believe, however, that a remand would be inappropriate.

First, Virginia concedes that EPA properly disapproved its original submission on the basis of defects (2) through (5). We may affirm the agency on this basis, and this basis alone, if the CAA passes constitutional muster. Although the EPA "Administrator may approve a program [just] to the extent that the program meets the requirements of" the Act, she is not required to do so, and she has the authority to disapprove the entire program on the basis of one defect. CAA § 502(d)(1), 42 U.S.C. § 7661a(d)(1).

Second, EPA has not yet determined whether Virginia's new submission is adequate, because EPA has not completed the notice and comment rulemaking proceeding required by CAA § 502(d)(1). And absent any agency

record, we have no way of knowing whether the new submission in fact complies with the CAA, as Virginia claims. *See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-34 (1976) (per curiam); *cf. Virginia Agric. Growers Ass'n v. Donovan*, 774 F.2d 89, 92 (4th Cir. 1985) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court") (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)); *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1325 (D.C. Cir. 1984) ("judicial reliance on an agency's stated rationale and findings is central to a harmonious relationship between agency and court"), *aff'd in pertinent part sub. nom. San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), *cert. denied*, 479 U.S. 923 (1986).

A remand would serve no useful purpose here, and accordingly we reject Virginia's suggestion.

III.

Virginia claims that EPA erroneously determined that Virginia's permit program contained inadequate judicial review provisions (defect (1)). EPA's finding that Virginia submitted a deficient permit program must be upheld unless that finding is "arbitrary, capricious, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We find that EPA correctly determined that Virginia's proposed judicial review provisions do not comply with the Act. Therefore, even if EPA had based its disapproval solely on defect (1), such disapproval would not have been arbitrary and capricious.

A.

CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6), provides that a state permit program must contain:

> Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including *an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.*

(Emphasis supplied.)

The emphasized portion of this provision is at issue here. A state permit program will be disapproved unless the state submits a legal opinion stating that the proposed Title V program allows state court review of permitting decisions upon the request of "the [permit] applicant, any person who participated in the public participation process . . . and any other person who could obtain judicial review of such actions under State laws." 40 C.F.R. § 70.4(b)(3)(x). EPA interprets the statute and regulation to require, at a minimum, that states provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution. *Notice of Proposed Disapproval,* 59 Fed. Reg. 31183, 31184 (June 17, 1994).

Virginia law grants standing to seek judicial review of permitting decisions to "[a]ny owner aggrieved by" such decisions. Va. Code § 10.1-1318(A). This provision satisfies CAA § 502(b)(6)'s requirement that the permit "applicant" be allowed to seek judicial review. But § 502(b)(6) also requires that states grant certain standing rights to members of the public, and here is where Virginia's judicial review provision falls short of the mark. Under Virginia's provision, a member of the public "who is aggrieved by a final [permitting decision] who participated, in person or by submittal of written comments, in the public comment process" may only seek judicial review of a permitting decision if he can establish that

> (i) [he] has suffered an actual, threatened, or imminent injury; (ii) such injury is an invasion of an immediate, legally protected, *pecuniary and substantial* interest which is concrete and particularized; (iii) such injury is fairly traceable to the [permitting decision] and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision of the court.

Va. Code § 10.1-1318(B) (emphasis supplied).

According to EPA, this provision is too restrictive: limiting availability of review to those persons with "pecuniary and substantial" interests violates CAA § 502(b)(6). We agree with EPA.

B.

1.

Virginia argues that the text of CAA § 502(b)(6) does not require states to slacken their rules of judicial standing at all.

The critical language to be examined is: "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law."

As Virginia reads the statute, the final clause, "who could obtain judicial review of that action under applicable [state] law," modifies all three categories of persons earlier described as being allowed to seek judicial review: "the applicant," "any person who participated in the public comment process," and "any other person." Thus, according to Virginia, § 506(b)(6) requires states to grant standing to participants in the public comment process only if those persons would otherwise have standing under existing state law.

Virginia's proposed reading is contrary to ordinary principles of statutory construction and to the rules of English usage. The clause, "who could obtain judicial review of that action under applicable law," modifies only the immediately preceding category, "any other person." An elementary principle of statutory construction is the "last antecedent" rule, which holds that ordinarily a clause modifies only its nearest antecedent. *In re Grewe*, 4 F.3d 299, 302 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1056 (1994).

Furthermore, if the last antecedent rule does not apply, and the clause modifies all three categories, then there would have been no need for Congress to have included the first two categories. The statute could have been written simply to say that standing should be given to "any person" who complied with state standing rules. A court should not – and we will not – construe a statute in a manner that reduces some of its terms to mere surplusage. *See Arkansas Best Corp. v. Commissioner*, 485 U.S. 212, 218 (1988).

Properly read, the final clause simply allows the states to grant broader standing rights than those otherwise required under federal law.

> This provision ensures that existing provisions of law governing the availability of review of final actions on permit applications are in no way limited, and that interested persons who arguably are affected by permit decisions are guaranteed their day in court.

Chafee-Baucus Statement, 136 Cong. Rec. at S169941. In other words, the clause "who could obtain judicial review of that action under applicable law" creates a floor of rights, rather than a ceiling, and ensures that the CAA does not inadvertently diminish standing rights previously granted under state laws.

2.

A literal reading of the latter part of § 502(b)(6), then, would require that a state allow "any person who participated in the public comment process" to seek judicial review of permitting decisions. EPA, however, does not

require that states go that far in providing for judicial review. EPA has determined that § 502(b)(6) is satisfied (and that therefore a state permit program may be approved) if a state grants standing only to those participants in the public comment process who would have Article III standing to sue in federal court.[5]

This determination is justified by analysis of the opening portion of § 502(b)(6), which requires that states provide "[a]dequate, streamlined, and reasonable procedures for expeditiously" making permitting decisions. The two parts of the section must be harmonized, and EPA has done that by creating a safe harbor keyed to Article III standing.

But Virginia claims that because EPA agrees that § 502(b)(6), when read in its entirety, is ambiguous, the states may propose any Title V program that reasonably accommodates the statute's disharmonious provisions. Virginia claims that because its "pecuniary and substantial interest" requirement is a reasonable way to resolve the tension inherent in § 502(b)(6), EPA was arbitrary and capricious in its decision to reject Virginia's proposal.

We disagree. EPA's interpretation, if reasonable, must take precedence over any interpretation Virginia could offer or, indeed, even over any alternative interpretation we could formulate. *Chevron, U.S.A., Inc. v. Natural*

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[5] For Article III standing purposes, a potential litigant must show (1) actual or imminent injury that is concrete and particularized, (2) causal connection between the challenged conduct and the injury, and (3) likelihood that the injury would be redressed by favorable judicial action. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

Resources Defense Council, 467 U.S. 837, 844 (1984). We defer to EPA's definition of the bounds of the § 502(b)(6) safe harbor because "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

EPA's interpretation of the judicial review portion of CAA § 502(b)(6) harmonizes it with the portion that requires states to provide "[a]dequate, streamlined, and reasonable procedures." We find EPA's importation of Article III principles to resolve the slight tension within CAA § 502(b)(6) to be reasonable. The Article III test is convenient to apply, primarily because a body of national caselaw interpreting Article III standing requirements already exists. *See, e.g., Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639, 642 (3d Cir. 1995); *Chambers Medical Technologies v. Bryant*, 52 F.3d 1252, 1265 (4th Cir. 1995); *Williams v. Lambert*, 46 F.3d 1275, 1278 (2d Cir. 1995); *Ass'n for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 243 (5th Cir. 1994); *Adams v. Watson*, 10 F.3d 915, 918 (1st Cir. 1993); *Banks v. Secretary of Indiana Family and Social Servs. Admin.*, 997 F.2d 231, 238 (7th Cir. 1993); *Central Ariz. Water Conservation Dist. v. United States EPA*, 990 F.2d 1531, 1537-38 (9th Cir.), *cert. denied*, 114 S. Ct. 94 (1993). Because EPA's "answer is based upon a permissible construction of the statute," we will follow EPA's choice of interpretation. *Chevron*, 467 U.S. at 843; *accord Monongahela Power Co. v. Reilly*, 980 F.2d 272, 278-79 (4th Cir. 1992).

Virginia argues that *Chevron* deference is inappropriate because EPA's area of expertise is the environment, not jurisdictional rules. *See Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914-15 (3d Cir. 1981). Again, we disagree. "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. Congress has charged EPA with inducing the states to implement a permitting program that satisfies certain judicial review requirements, and if Congress has decided that EPA has sufficient expertise in the area, it is not our place to say otherwise. *See* Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2097 (1990) ("an ad hoc inquiry into administrative competence would be an exceptionally poor way to handle the question whether *Chevron* applies").

Virginia also claims that *Gregory v. Ashcroft*, 501 U.S. 452 (1991), mandates a different result. Virginia is again mistaken. *Gregory* simply stands for the proposition that when congressional intent is unclear, a statute should be construed to avoid a constitutional question. That principle has no relevance in this case because here it is manifestly clear that Congress specifically intended that the states conform their judicial standing rules to meet the § 502(b)(6) standard. *See Association of Community Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 796 (7th Cir. 1995); *United States v. Lot 5*, 23 F.3d 359, 362 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 722 (1995); *EEOC v. Massachusetts*, 987 F.2d 64, 69 (1st Cir. 1993).

In *Gregory* the Supreme Court faced the question whether the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, applied to state judges. The ADEA

contained no express reference to state courts or judges, and therefore the Court concluded that the statute did not apply. If the statute did apply to state judges, the Court reasoned, then an inquiry into key federalism concerns would be required. Specifically, could Congress, under the guise of an antidiscrimination statute, alter the qualifications for state judges, or would doing so violate the Tenth Amendment? The Court held that it would construe the ADEA in a manner that would allow it to avoid the constitutional question. Because the statute did not expressly say that it applied to state judges, and because a difficult constitutional question would have been presented if the statute did in fact apply to state judges, the statute was interpreted as not applying to state judges.

The Clean Air Act contains no ambiguity of the kind present in *Gregory*. Even if EPA's interpretation of CAA § 502(b)(6) can be said to implicate Tenth Amendment concerns by intruding upon what Virginia claims to be a core element of its sovereignty, *see* IV.A, *infra*, that interpretation is specifically authorized by the "plain statement" of Congress. *Gregory*, 501 U.S. at 461. In *Gregory*, the question was whether the ADEA applied to the state judiciary at all. Here, by contrast, Congress intended CAA § 502(b)(6) to apply to state courts, and Congress made "its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). By its terms, § 502(b)(6) could apply to *nothing but state courts*.

Here, EPA resolved the slight tension within § 502(b)(6) by interpreting the section to require that states, at a minimum, extend judicial review rights to participants in

the state public comment process who satisfy the standard for Article III standing. This resolution is both authorized by Congress and reasonable, and therefore we must reject Virginia's alternative interpretation.

3.

Virginia also argues that even if the Article III test is proper, Virginia's "pecuniary and substantial interest" requirement satisfies it. Again, we disagree.

A plaintiff need not show "pecuniary" harm to have Article III standing; injury to health or to aesthetic, environmental, or recreational interests will suffice. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-87 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

In recent cases, Virginia courts have denied standing to plaintiffs who would have met Article III's standing requirements. For example, in *Fries v. State Water Control Bd.*, 409 S.E.2d 634, 637 (Va. Ct. App. 1991), it was held that a town lacked standing to seek judicial review of the decision of the State Water Control Board to grant a permit, even though the permit allowed a sewage treatment plant to discharge waste directly upstream of the town. Standing also was denied to individual riparian landowners. The court held that "an anticipated public injury" was not "an immediate, pecuniary, and substantial interest" such that standing should be allowed. *Id.; see also Citizens for Clean Air v. Commonwealth*, 412 S.E.2d 715, 719-21 (Va. Ct. App. 1991) (because unincorporated association was not an "owner aggrieved" under Virginia law, association was denied standing to challenge permitting

decision of State Air Pollution Control Board, even though association members owned real estate near plant granted permit, were bothered by foul odors emitted by plant, and alleged decline in property values); *Environmental Defense Fund v. Virginia State Water Control Bd.*, 404 S.E.2d 728, 731-32 (Va. Ct. App. 1991) (standing denied to association seeking review of water pollution permit decision, even though association represented both recreational users of a river and riparian landowners).

Virginia caselaw makes it clear that the "pecuniary and substantial interest" requirement is more stringent than Article III's requirement of concrete and particularized injury.

4.

Section 502(b)(6)'s requirement of broad availability of judicial review is necessary to ensure that the required public comment period serves its proper purpose. The comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him. EPA recently recognized this principle in another context:

> When citizens are denied the opportunity to challenge executive decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a state is not addressing their concerns about [ ] permits because the citizens have no recourse to an

> impartial judiciary, that perception also has a chilling effect on all the remaining forms of public participation in the permitting process.

Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 60 Fed. Reg. 14588, 14589 (March 17, 1995) (notice of proposed rulemaking).

5.

Because Virginia's permit program did not provide the minimum judicial review rights required under § 506(b)(6), it was not arbitrary and capricious for EPA to disapprove Virginia's submission.

IV.

Having determined that EPA had a valid reason to disapprove Virginia's permit program, we now examine whether Title V and its sanctions provisions are constitutional. Virginia claims that Title V and its sanctions provisions are unconstitutional because they impinge upon a fundamental element of state sovereignty, the state's right to articulate its own rules of judicial standing. Even assuming *arguendo* the accuracy of Virginia's assertion that its standing rules are within the core of its sovereignty, we find no constitutional violation because federal law "may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority." *FERC v. Mississippi*, 456 U.S. 742, 766 (1982). As we explain below, we believe that if Virginia chooses to change its rules of judicial standing, it will

make the change only because the CAA's sanctions provisions induce it to do so, not because they coerce it.

A.

We agree that Congress lacks power to impinge upon "the core of sovereignty retained by the States." *New York v. United States*, 112 S. Ct. 2408, 2419 (1992). We also agree that an important aspect of a state's sovereignty is the administration of its judicial system. *See Gregory*, 501 U.S. at 460. Thus, a state cannot be required to create a court with power to decide federal claims, if no court otherwise exists. *Howlett v. Rose*, 496 U.S. 356, 372 (1990). Similarly, a state may apply neutral venue rules to require that federal claims be brought in a particular state court. *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945), *overruled in part on other grounds by Michigan v. Long*, 463 U.S. 1032 (1983). But the Supremacy Clause compels state judges to apply federal law, if such law is applicable. U.S. Const. art. VI, cl. 2. Furthermore, to require an existing state administrative body to adjudicate a dispute arising under federal law does not unreasonably interfere with state sovereignty. *FERC*, 456 U.S. at 760; *see also Testa v. Katt*, 330 U.S. 386 (1947) (state court must entertain civil action arising under federal Emergency Price Control Act); *E.A. v. State*, 623 P.2d 1210, 1215 n.13 (Alaska, 1981) (state court must exercise jurisdiction over actions brought pursuant to federal Indian Child Welfare Act); *cf. Mack v. United States*, 66 F.3d 1025, 1029-30 (9th Cir. 1995) (state law enforcement officials may be required to assist in operation of federal law enforcement scheme).

We need not decide whether judicial standing rules fall within the core of sovereignty identified in *Gregory* and *Howlett, supra,* because we find that the CAA does not compel the states to modify their standing rules, it merely induces them to do so.[6] The CAA is constitutional because although its sanctions provisions potentially burden the states, those sanctions amount to inducement rather than "outright coercion." *See New York,* 112 S. Ct. at 2423. We examine each sanction separately to explain how we reach this conclusion. *See id.* at 2425.

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[6] In its brief and during oral argument Virginia claimed that CAA § 113, 42 U.S.C. § 7413, exposes the state and its elected officials to civil and criminal liability for failure to promulgate a valid state permit program. A careful reading of this section, however, discloses that it provides for enforcement of an *approved* state permit program. Sanctions under § 113 may not be used to force Virginia to promulgate any state permit program, and EPA has not proposed invoking § 113 in this case. Sanctions under this section are available only to redress "violations of . . . approved permit program under subchapter [Title] V." CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2). EPA has not approved Virginia's proposed Title V program, so no "approved permit program" yet exists to trigger any § 113 sanctions against any Virginia official. In addition, EPA has expressed no intention to seek § 113 sanctions against Virginia officials in the future. For these reasons, a constitutional challenge to § 113 is unripe. *Renne v. Geary,* 501 U.S. 312, 321-22 (1991). The threat of such sanctions has not been "felt in a concrete way by" any Virginia official. *Reno v. Catholic Social Servs., Inc.,* 113 S. Ct. 2485, 2495 (1993) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967)); *accord Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 891 (1990).

B.

Two sources of Congressional power allow use of the highway sanction. Because the elimination of air pollution promotes the general welfare, Congress may tie the award of federal funds to the states' efforts to eliminate air pollution. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I § 8, cl. 1. Furthermore, the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, gives Congress the power to regulate "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

Generally, Congress may use the power of the purse to encourage states to enact particular legislation. *New York*, 112 S. Ct. at 2423. This power, however, is not limitless. Exercise of the power to the point of "outright coercion" violates the Constitution. *Id.* "[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).[7] Also, it has been suggested that federal funds may be subject to conditions "only in ways reasonably related to the purpose for which the funds are expended." *South Dakota*, 483 U.S. at 213 (O'Connor, J.,

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[7] In *South Dakota* the Supreme Court upheld an Act of Congress that denied a percentage of highway funds to states that refused to enact a minimum drinking age of 21.

dissenting); *see also New York*, 112 S. Ct. at 2426. No court, however, has ever struck down a federal statute on grounds that it exceeded the Spending Power. *See Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

The highway sanction here does not rise to the level of "outright coercion." First, a state does not lose any highway funds that would be spent in areas of the state that are in attainment. CAA § 179(b)(1)(A), 42 U.S.C. § 7509(b)(1)(A). Second, even within nonattainment areas, federal highway funds may be spent on projects designed to promote safety or designed to reduce air pollution. CAA § 179(b)(1), 42 U.S.C. § 7509(b)(1). More severe funding restrictions than those at issue here have been upheld. *See, e.g., New York*, 112 S. Ct. at 2426-27; *Skinner, supra* (virtually all highway funds); *Oklahoma v. Schweiker*, 655 F.2d 401 (D.C. Cir. 1981) (all Medicaid funds); *Nebraska, Dep't of Roads v. Tiemann*, 510 F.2d 446 (8th Cir. 1975) (broad category of highway funds).

Virginia concedes that it is allowed to spend federal money on safety projects, on projects that will reduce pollution, and on projects within areas that are in attainment. The Commonwealth contends, however, that because it is difficult to shift funds from one transportation project to another, these exemptions do not reduce the sanction's coercive effect. According to Virginia, it simply lacks the time to reallocate funds away from highway projects it has already planned for nonattainment areas. To this argument we can only say that Title V was enacted in 1990, and the states have had more than five years either to comply or to prepare themselves for the consequences of noncompliance.

And contrary to what Virginia claims, the conditions on spending are reasonably related to the goal of reducing air pollution. The CAA as a whole is a comprehensive scheme to cope with the problem of air pollution from all sources. Congress may ensure that funds it allocates are not used to exacerbate the overall problem of air pollution. It is therefore of no consequence that a highway sanction, which will have the effect of reducing emissions from mobile pollution sources, is being used to induce compliance with a portion of the Act designed to reduce emissions from stationary sources.

We hold that the highway sanction, CAA § 179(b)(1), is a valid exercise of the Spending Power. As a valid exercise of that power, it also comports with the requirements of the Tenth Amendment. *New York*, 112 S. Ct. at 2427. Congress has not overstepped its bounds here.

C.

The offset sanction, CAA § 179(b)(2), 42 U.S.C. § 7509(b)(2), which limits new construction or modification of major stationary sources of air pollution, is constitutional because it regulates private pollution sources, not states.

The burden of the offset sanction falls on private parties. The more stringent offset requirements will likely make it more difficult for individual pollution sources (manufacturers, utilities, and the like) to upgrade or modify existing plants and equipment or to open new plants. Thus, although the sanction may burden some Virginia citizens, it does not burden Virginia as a *governmental* unit. For this reason, the sanction does not violate the principles of

federalism embodied in the Tenth Amendment. *New York*, 112 S. Ct. at 2427 (upholding a sanction because "any burden caused by a state's refusal to regulate will fall on" private citizens); *Hodel*, 452 U.S. at 288 (harm to citizens of states does not create Tenth Amendment violation, absent direct harm to state governmental entities). The offset sanction is constitutional.

D.

The final sanction, Federal permit program implementation, CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3), also is constitutional. The essence of a Tenth Amendment violation is that the state is commanded to regulate. Here, Virginia is not commanded to regulate; the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia. Because "the full regulatory burden will be borne by the Federal Government," the sanction is constitutional. *Hodel*, 452 U.S. at 288.

Hodel, in fact, is the mirror image of this case and controls our decision. In *Hodel* the federal government first implemented an environmental regulatory regime within each state but then gave each state the ability to end the federal program by implementing its own state environmental regulations that met certain criteria. In the present situation, the federal government gives the states the chance to enact their own regulations before the federal plan is imposed. For purposes of constitutional analysis, we cannot see how it makes a difference whether the federal plan is imposed first, or whether the states are given the chance to avoid imposition of the federal plan

first. If anything, the CAA's method – to give the states a chance first to avoid imposition of any federal plan by promulgating satisfactory regulations – seems less coercive than the program upheld in *Hodel*. The CAA simply "establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.* at 289.

Because Congress may choose to preempt state law completely, it may also take the less drastic step of allowing the states the ability to avoid preemption by adopting and implementing their own plans that sufficiently address congressional concerns. *Id.* at 290; *Mack*, 66 F.3d at 1029 ("The federal government may offer to preempt regulation in a given area and permit the states to avoid preemption if they regulate in a manner acceptable to Congress.").

In *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 U.S. 99 (1977) (per curiam), this court examined regulations promulgated under the CAA that on their face would have directly required Maryland to enact statutes and to administer an EPA plan. *See also District of Columbia v. Train*, 521 F.2d 971, 983 (D.C. Cir. 1975), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 U.S. 99 (1977) (per curiam).

The regulations in *Maryland* provided that "the state of Maryland shall" establish and implement certain pollution control programs. 530 F.2d at 219. EPA argued that the regulations' use of the word, "shall," meant that if

Maryland did not comply, EPA could seek to impose civil and criminal penalties on the state for noncompliance. *Id.* at 224. We rejected that proposed interpretation as "astonishing," *id.*, and said it "would reduce the states to the puppets of a ventriloquist Congress." *Id.* at 226 (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977) (per curiam)). Had we accepted EPA's proposed interpretation, Maryland's legislature would have been directly compelled to regulate, a result that would have offended the Tenth Amendment. *Maryland*, 530 F.2d at 224. Instead, we interpreted the regulations as authorizing EPA to implement a federal pollution control program directly. *Id.* at 227-28. This interpretation of the regulations did not offend the Tenth Amendment, even though Maryland was put under some pressure to pass laws satisfying federal criteria in order to avoid the Federal implementation. "Congress may induce a state to act by offering favors or exacting financial penalties." *Id.* at 226. *See also Train*, 521 F.2d at 984-85 (this procedure is "quite unremarkable"). In *Maryland* we sent Congress and EPA a signal that they could constitutionally use sanctions such as those at issue here.

Finally, the CAA's sanctions provisions maintain unity between regulation and political accountability. If sanctions are imposed, it will be "the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 112 S. Ct. at 2424. The sanctions provisions are constitutional.

V.

In sum, we conclude (1) that EPA correctly disapproved Virginia's proposed State permit program because it did not satisfy the provisions of the Clean Air Act and (2) that the sanctions Virginia faces are constitutional. The petition for review is denied.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 12, 1996

No. 95-1052

COMMONWEALTH OF VIRGINIA

Petitioner

v.

CAROL M. BROWNER, Administrator,
U. S. Environmental Protection Agency;
ENVIRONMENTAL PROTECTION AGENCY;

Respondents

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, AND AMERICAN LUNG ASSOCIATION OF VIRGINIA; CLEAN WATER ACTION; FRIENDS OF THE RIVERS OF VIRGINIA; THE JAMES RIVER ASSOCIATION; MOUNTAIN HERITAGE ALLIANCE; VALLEY CONCERNED CITIZENS; VIRGINIA CHAPTER OF THE SIERRA CLUB; VIRGINIA CITIZEN ACTION; VIRGINIA CONSORTIUM FOR CLEAN AIR; VIRGINIA COUNCIL, TROUT UNLIMITED; ENVIRONMENTAL DEFENSE FUND, INCORPORATED; KATHLEEN F. DERRICOTT; CLIFTON E. DERRICOTT; ANDRE L. BROWN; CALEATA JOHNSON; GWEN HEDGEPATH; AUDUBON NATURALIST SOCIETY

Intervenors

VIRGINIA MANUFACTURERS ASSOCIATION; WASHINGTON LEGAL FOUNDATION; OGDEN MARTIN SYSTEMS OF LANCASTER, INCORPORATED; OGDEN MARTIN SYSTEMS OF ALEXANDRIA,

INCORPORATED; NATIONAL INDEPENDENT ENERGY PRODUCERS; OGDEN MARTIN SYSTEMS OF MONTGOMERY, INCORPORATED; OGDEN MARTIN SYSTEMS OF FAIRFAX, INCORPORATED; CHESAPEAKE BAY FOUNDATION

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Petitioner filed a petition for rehearing with suggestion for rehearing in banc.

Judge Murnaghan, Judge Michael, and Judge James H. Michael, Jr., Senior U. S. District Judge, sitting by designation, voted to deny the petition for rehearing.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Russell, Widener, Wilkins, Luttig and Williams voted to rehear the case in banc, and Chief Judge Wilkinson and Judges Hall, Murnaghan, Ervin, Niemeyer, Hamilton, Motz and Michael voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Michael for the Court.

For the Court,

/s/ Bert M. Montague
CLERK

TITLE V

42 U.S.C. § 7661 [CAA § 501]

§ 7661. Definitions [CAA § 501]

As used in this subchapter –

(1) Affected source

The term "affected source" shall have the meaning given such term in subchapter IV-A of this chapter.

(2) Major source

The term "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following:

(A) A major source as defined in section 7412 of this title.

(B) A major stationary source as defined in section 7602 of this title or part D of subchapter I of this chapter.

(3) Schedule of compliance

The term "schedule of compliance" means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.

(4) Permitting authority

The term "permitting authority" means the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter.

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§ 7661a. Permit programs [CAA § 502]

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this

chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

(b) Regulations

The Administrator shall promulgate within 12 months after November 15, 1990 regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

(1) Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of applications.

(2) Monitoring and reporting requirements.

(3)(A) A requirement under State or local law or interstate compact that the owner or operator of all sources subject to the requirement to obtain a permit under this subchapter pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this subchapter, including section 7661f of this title, including the reasonable costs of –

(i) reviewing and acting upon any application for such a permit,

(ii) if the owner or operator receives a permit for such source, whether before or after November 15, 1990, implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

(iii) emissions and ambient monitoring,

(iv) preparing generally applicable regulations, or guidance,

(v) modeling, analyses, and demonstrations, and

(vi) preparing inventories and tracking emissions.

(B) The total amount of fees collected by the permitting authority shall conform to the following requirements:

(i) The Administrator shall not approve a program as meeting the requirements of this paragraph unless the State demonstrates that, except as otherwise provided in subparagraphs (ii) through (v) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than $25 per ton of each regulated pollutant, or such other amount as the Administrator may determine adequately reflects the reasonable costs of the permit program.

(ii) As used in this subparagraph, the term "regulated pollutant" shall mean (I) a

volatile organic compound; (II) each pollutant regulated under section 7411 or 7412 of this title; and (III) each pollutant for which a national primary ambient air quality standard has been promulgated (except that carbon monoxide shall be excluded from this reference).

(iii) In determining the amount under clause (i), the permitting authority is not required to include any amount of regulated pollutant emitted by any source in excess of 4,000 tons per year of that regulated pollutant.

(iv) The requirements of clause (i) shall not apply if the permitting authority demonstrates that collecting an amount less than the amount specified under clause (i) will meet the requirements of subparagraph (A).

(v) The fee calculated under clause (i) shall be increased (consistent with the need to cover the reasonable costs authorized by subparagraph (A)) in each year beginning after 1990 by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989. For purposes of this clause –

(I) the Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year, and

(II) the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1989 shall be used.

(C)(i) If the Administrator determines, under subsection (d) of this section, that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under subsection (i) of this section, that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under this subchapter, collect reasonable fees from the sources identified under subparagraph (A). Such fees shall be designed solely to cover the Administrator's costs of administering the provisions of the permit program promulgated by the Administrator.

(ii) Any source that fails to pay fees lawfully imposed by the Administrator under this subparagraph shall pay a penalty of 50 percent of the fee amount, plus interest on the fee amount computed in accordance with section 6621(a)(2) of Title 26 (relating to computation of interest on underpayment of Federal taxes).

(iii) Any fees, penalties, and interest collected under this subparagraph shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the Agency's activities for which the fees were collected. Any fee required to be collected by a State, local, or interstate agency under this subsection shall be utilized solely to cover all reasonable

(direct and indirect) costs required to support the permit program as set forth in subparagraph (A).

(4) Requirements for adequate personnel and funding to administer the program.

(5) A requirement that the permitting authority have adequate authority to:

(A) issue permits and assure compliance by all sources required to have a permit under this title with each applicable standard, regulation or requirement under this Act;

(B) issue permits for a fixed term, not to exceed 5 years;

(C) assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan;

(D) terminate, modify, or revoke and reissue permits for cause;

(E) enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and provide appropriate criminal penalties; and

(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review or permit

actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as appropriate, subchapter IV-A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

(8) Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

(9) A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as

practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals.

(10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emission: *Provided,* That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

(c) Single permit

A single permit may be issued for a facility with multiple sources.

(d) Submission and approval

(1) Not later than 3 years after November 15, 1990, the Governor of each State shall develop and submit to the Administrator a permit program under State or local

law or under an interstate compact meeting the requirements of this subchapter. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority to carry out the program. Not later than 1 year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove such program, in whole or in part. The Administrator may approve a program to the extent that the program meets the requirements of this chapter, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within 180 days after receiving notification.

(2)(A) If the Governor does not submit a program as required under paragraph (1) or if the Administrator disapproves a program submitted by the Governor under paragraph (1), in whole or in part, the Administrator may, prior to the expiration of the 18-month period referred to in subparagraph (B), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(B) If the Governor does not submit a program as required under paragraph (1), or if the Administrator disapproves any such program submitted by the Governor under paragraph (1), in whole or in part, 18 months

after the date required for such submittal or the date of such disapproval, as the case may be, the Administrator shall apply sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(C) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this paragraph in any area unless the failure to submit or the disapproval referred to in subparagraph (A) or (B) relates to an air pollutant for which such area has been designated a nonattainment area (as defined in part D of subchapter I of this chapter).

(3) If a program meeting the requirements of this subchapter has not been approved in whole for any State, the Administrator shall, 2 years after the date required for submission of such a program under paragraph (1), promulgate, administer, and enforce a program under this subchapter for that State.

(e) Suspension

The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may, in such notice, retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this subchapter until they are replaced by a permit issued by a permitting program. Nothing in this

subsection should be construed to limit the Administrator's ability to enforce permits issued by a State.

(f) Prohibition

No partial permit program shall be approved unless, at a minimum, it applies, and ensures compliance with, this subchapter and each of the following:

> **(1)** All requirements established under subchapter IV-A of this chapter applicable to "affected sources".
>
> **(2)** All requirements established under section 7412 of this title applicable to "major sources", "area sources", and "new sources".
>
> **(3)** All requirements of subchapter I of this chapter (other than section 7412 of this title) applicable to sources required to have a permit under this subchapter. Approval of a partial program shall not relieve the State of its obligation to submit a complete program, nor from the application of any sanctions under this chapter for failure to submit an approvalable permit program.

Approval of a partial program shall not relieve the State of its obligation to submit a complete program, nor from the application of any sanctions under this chapter for failure to submit an approvable permit program.

(g) Interim approval

If a program (including a partial permit program) submitted under this subchapter substantially meets the

requirements of this subchapter, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than 2 years after such approval, and may not be renewed. For the period of any such interim approval, the provisions of subsection (d)(2) of this section, and the obligation of the Administrator to promulgate a program under this subchapter for the State pursuant to subsection (d)(3) of this section, shall be suspended. Such provisions and such obligation of the Administrator shall apply after the expiration of such interim approval.

(h) Effective date

The effective date of a permit program, or partial or interim program, approved under this subchapter, shall be the effective date of approval by the Administrator. The effective date of a permit program, or partial permit program, promulgated by the Administrator shall be the date of promulgation.

(i) Administration and enforcement

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, the Administrator shall provide notice to the State and may, prior to the expiration of the 18-month

period referred to in paragraph (2), in the Administrator's discretion, apply any of the sanctions specified in section 7509(b) of this title.

(2) Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this subchapter, 18 months after the date of the notice under paragraph (1), the Administrator shall apply the sanctions under section 7509(b) of this title in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 7509(a) of this title.

(3) The sanctions under section 7509(b)(2) of this title shall not apply pursuant to this subsection in any area unless the failure to adequately enforce and administer the program relates to an air pollutant for which such area has been designated a nonattainment area.

(4) Whenever the Administrator has made a finding under paragraph (1) with respect to any State, unless the State has corrected such deficiency within 18 months after the date of such finding, the Administrator shall, 2 years after the date of such finding, promulgate, administer, and enforce a program under this subchapter for that State. Nothing in this paragraph shall be construed to affect the validity of a program which has been approved under this subchapter or the authority of any permitting authority acting under such program until such time as such program is promulgated by the Administrator under this paragraph.

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§ 7661b. Permit applications [CAA § 503]

(a) Applicable date

Any source specified in section 7661a(a) of this title shall become subject to a permit program, and required to have a permit, on the later of the following dates –

(1) the effective date of a permit program or partial or interim permit program applicable to the source; or

(2) the date such source becomes subject to section 7661a(a) of this title.

(b) Compliance plan

(1) The regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance, and a schedule under which the permittee will submit progress reports to the permitting authority no less frequently than every 6 months.

(2) The regulations shall further require the permittee to periodically (but no less frequently than annually) certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report any deviations from permit requirements to the permitting authority.

(c) Deadline

Any person required to have a permit shall, not later than 12 months after the date on which the source becomes subject to a permit program approved or promulgated under this subchapter, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. The permitting authority shall approve or disapprove a completed application (consistent with the procedures established under this subchapter for consideration of such applications), and shall issue or deny the permit, within 18 months after the date of receipt thereof, except that the permitting authority shall establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of a permit program (or a partial or interim program). Any such schedule shall assure that at least one-third of such permits will be acted on by such authority annually over a period of not to exceed 3 years after such effective date. Such authority shall establish reasonable procedures to prioritize such approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this chapter.

(d) Timely and complete applications

Except for sources required to have a permit before construction or modification under the applicable requirements of this chapter, if an applicant has submitted a timely and complete application for a permit

required by this subchapter (including renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application. No source required to have a permit under this subchapter shall be in violation of section 7661a(a) of this title before the date on which the source is required to submit an application under subsection (c) of this section.

(e) Copies; availability

A copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this subchapter, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 7414(c) of this title, the applicant or permittee may submit such information separately. The requirements of section 7414(c) of this title shall apply to such information. The contents of a permit shall not be entitled to protection under section 7414(c) of this title.

§ 7661c. Permit requirements and conditions [CAA § 504]

(a) Conditions

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

(b) Monitoring and analysis

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this Act, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

(c) Inspection, entry, monitoring, certification, and reporting

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance

with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

(d) General permits

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources

The permitting authority may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this chapter at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under part C of subchapter I of this chapter. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

(f) Permit shield

Compliance with a permit issued in accordance with this subchapter shall be deemed compliance with section 7661a of this title. Except as otherwise provided by the Administrator by rule, the permit may also provide the compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if –

(1) the permit includes the applicable requirements of such provisions, or

(2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

Nothing in the preceding sentence shall alter or affect the provisions of section 7603 of this title, including the authority of the Administrator under that section.

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§ 7661d. Notification to administrator and contiguous States [CAA § 505]

(a) Transmission and notice

(1) Each permitting authority –

(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or

such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this chapter, and

(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit.

(2) The permitting authority shall notify all States –

(A) whose air quality may be affected and that are contiguous to the State in which the emission originates, or

(B) that are within 50 miles of the source, of each permit application or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

(b) Objection by EPA

(1) If any permit contains provisions that are determined by the administrator as not in compliance with the applicable requirements of this chapter, including the requirements of an applicable implementation plan, the Administrator shall, in accordance with this subsection, object to its issuance. The permitting authority shall

respond in writing if the Administrator (A) within 45 days after receiving a copy of the proposed permit under subsection (a)(1), or (B) of this section within 45 days after receiving notification under subsection (a)(2) of this section, objects in writing to its issuance as not in compliance with such requirements. With the objection, the Administrator shall provide a statement of the reasons for the objection. A copy of the objection and statement shall be provided to the applicant.

(2) If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action. A copy of such petition shall be provided to the permitting authority and the applicant by the petitioner. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). The petition shall identify all such objections. If the permit has been issued by the permitting agency, such petition shall not postpone the effectiveness of the permit. The Administrator shall grant or deny such petition within 60 days after the petition is filed. The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan. Any denial of

such petition shall be subject to judicial review under section 7607 of this title. The administrator shall include in regulations under this subchapter provisions to implement this paragraph. The Administrator may not delegate the requirements of this paragraph.

(3) Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.

(c) Issuance or denial

If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.

(d) Waiver of notification requirements

(1) The Administrator may waive the requirements of subsections (a) and (b) of this section at the time of approval of a permit program under this subchapter for

any category (including any class, type, or size within such category) of sources covered by the program other than major sources.

(2) The Administrator may, by regulation, establish categories of sources (including any class, type, or size within such category) to which the requirements of subsections (a) and (b) of this section shall not apply. The preceding sentence shall not apply to major sources.

(3) The Administrator may exclude from any waiver under this subsection notification under subsection (a)(2) of this section. Any waiver granted under this subsection may be revoked or modified by the Administrator by rule.

(e) Refusal of permitting authority to terminate, modify, or revoke and reissue

If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit under this subchapter, the Administrator shall notify the permitting authority and the source of the Administrator's finding. The permitting authority shall, within 90 days after receipt of such notification, forward to the Administrator under this section a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend such 90 day period for an additional 90 days if the Administrator finds that a new or revised permit application is necessary, or that the permitting authority must require the permittee to submit additional information. The Administrator may review such proposed determination under the provisions of subsections (a) and (b) of this section. If

the permitting authority fails to submit the required proposed determination, or if the Administrator objects and the permitting authority fails to resolve the objection within 90 days, the administrator may, after notice and in accordance with fair and reasonable procedures, terminate, modify, or revoke and reissue the permit.

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§ 7661e. Other authorities [CAA § 506]

(a) In general

Nothing in this subchapter shall prevent a State, or interstate permitting authority, from establishing additional permitting requirements not inconsistent with this chapter.

(b) Permits implementing acid rain provisions

The provisions of this subchapter, including provisions regarding schedules for submission and approval or disapproval of permit applications, shall apply to permits implementing the requirements of subchapter IV-A of this chapter except as modified by that subchapter.

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§ 7661f. Small business stationary source technical and environmental compliance assistance program [CAA § 507]

(a) Plan revisions

Consistent with sections 7410 and 7412 of this title, each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator as part of the State implementation plan for such State or as a revision to such State implementation plan under section 7410 of this title, plans for establishing a small business stationary source technical and environmental compliance assistance program. Such submission shall be made within 24 months after November 15, 1990. The Administrator shall approve such program if it includes each of the following:

(1) Adequate mechanisms for developing, collecting, and coordinating information concerning compliance methods and technologies for small business stationary sources, and programs to encourage lawful cooperation among such sources and other persons to further compliance with this chapter.

(2) Adequate mechanisms for assisting small business stationary sources with pollution prevention and accidental release detection and prevention, including providing information concerning alternative technologies, process changes, products, and methods of operation that help reduce air pollution.

(3) A designated State office within the relevant State agency to serve as ombudsman for small business stationary sources in connection with the implementation of this chapter.

(4) A compliance assistance program for small business stationary sources which assists small business stationary sources in determining applicable requirements and in receiving permits under this chapter in a timely and efficient manner.

(5) Adequate mechanisms to assure that small business stationary sources receive notice of their rights under this Act in such manner and form as to assure reasonably adequate time for such sources to evaluate compliance methods and any relevant or applicable proposed or final regulation or standard issued under this chapter.

(6) Adequate mechanisms for informing small business stationary sources of their obligations under this chapter, including mechanisms for referring such sources to qualified auditors or, at the option of the State, for providing audits of the operations of such sources to determine compliance with this chapter.

(7) Procedures for consideration of requests from a small business stationary source for modification of –

(A) any work practice or technological method of compliance, or

(B) the schedule of milestones for implementing such work practice or method of compliance preceding any applicable compliance date,

based on the technological and financial capability of any such small business stationary source. No such modification may be granted unless it is in compliance with the applicable requirements of this chapter, including the

requirements of the applicable implementation plan. Where such applicable requirements are set forth in Federal regulations, only modifications authorized in such regulations may be allowed.

(b) Program

The Administrator shall establish within 9 months after November 15, 1990 a small business stationary source technical and environmental compliance assistance program. Such program shall –

(1) assist the States in the development of the program required under subsection (a) of this section (relating to assistance for small business stationary sources);

(2) issue guidance for the use of the States in the implementation of these programs that includes alternative control technologies and pollution prevention methods applicable to small business stationary sources; and

(3) provide for implementation of the program provisions required under subsection (a)(4) of this section in any State that fails to submit such a program under that subsection.

(c) Eligibility

(1) Except as provided in paragraphs (2) and (3), for purposes of this section, the term "small business stationary source" means a stationary source that –

(A) is owned or operated by a person that employs 100 or fewer individuals,

(B) is a small business concern as defined in the Small Business Act [42 U.S.C.A. § 631 et seq.];

(C) is not a major stationary source;

(D) does not emit 50 tons or more per year of any regulated pollutant; and

(E) emits less than 75 tons per year of all regulated pollutants.

(2) Upon petition by a source, the State may, after notice and opportunity for public comment, include as a small business stationary source for purposes of this section any stationary source which does not meet the criteria of subparagraphs (C), (D), or (E) of paragraph (1) but which does not emit more than 100 tons per year of all regulated pollutants.

(3)(A) The administrator, in consultation with the Administrator of the Small Business Administration and after providing notice and opportunity for public comment, may exclude from the small business stationary source definition under this section any category or subcategory of sources that the Administrator determines to have sufficient technical and financial capabilities to meet the requirements of this chapter without the application of this subsection.

(B) The State, in consultation with the Administrator and the Administrator of the Small Business Administration and after providing notice and opportunity for public hearing, may exclude from the small business stationary source definition under this section any category or subcategory of sources that the State determines to have sufficient technical and financial capabilities to

meet the requirements of this chapter without the application of this subsection.

(d) Monitoring

The Administrator shall direct the Agency's Office of Small and Disadvantaged Business Utilization through the Small Business Ombudsman (hereinafter in this section referred to as the "Ombudsman") to monitor the small business stationary source technical and environmental compliance assistance program under this section. In carrying out such monitoring activities, the Ombudsman shall –

(1) render advisory opinions on the overall effectiveness of the Small Business Stationary Source Technical and Environmental Compliance Assistance Program, difficulties encountered, and degree and severity of enforcement;

(2) make periodic reports to the Congress on the compliance of the Small Business Stationary Source Technical and Environmental Compliance Assistance Program with the requirements of the Paperwork Reduction Act [44 U.S.C.A. § 3501 et seq.], the Regulatory Flexibility Act [5 U.S.C.A. § 601 et seq.], and the Equal Access to Justice Act;

(3) review information to be issued by the Small Business Stationary Source Technical and Environmental Compliance Assistance Program for small business stationary sources to ensure that the information is understandable by the layperson; and

(4) have the Small Business Stationary Source Technical and Environmental Compliance Assistance Program serve as the secretariat for the development and dissemination of such reports and advisory opinions.

(e) Compliance advisory panel

(1) There shall be created a Compliance Advisory Panel (hereinafter referred to as the "Panel") on the State level of not less than 7 individuals. This Panel shall –

(A) render advisory opinions concerning the effectiveness of the small business stationary source technical and environmental compliance assistance program, difficulties encountered, and degree and severity of enforcement;

(B) make periodic reports to the Administrator concerning the compliance of the State Small Business Stationary Source Technical and Environmental Compliance Assistance Program with the requirements of the Paperwork Reduction Act [44 U.S.C.A. § 3501 et seq.], the Regulatory Flexibility Act [5 U.S.C.A. § 601 et seq.], and the Equal Access to Justice Act;

(C) review information for small business stationary sources to assure such information is understandable by the layperson; and

(D) have the Small Business Stationary Source Technical and Environmental Compliance Assistance Program serve as the secretariat for the development and dissemination of such reports and advisory opinions.

(2) The Panel shall consist of –

(A) 2 members, who are not owners, or representatives of owners, of small business stationary sources, selected by the Governor to represent the general public;

(B) 2 members selected by the State legislature who are owners, or who represent owners, of small business stationary sources (1 member each by the majority and minority leadership of the lower house, or in the case of a unicameral State legislature, 2 members each shall be selected by the majority leadership and the minority leadership, respectively, of such legislature, and subparagraph (C) shall not apply);

(C) 2 members selected by the State legislature who are owners, or who represent owners, of small business stationary sources (1 member each by the majority and minority leadership of the upper house, or the equivalent State entity); and

(D) 1 member selected by the head of the department or agency of the State responsible for air pollution permit programs to represent that agency.

(f) Fees

The State (or the Administrator) may reduce any fee required under this chapter to take into account the financial resources of small business stationary sources.

(g) Continuous emission monitors

In developing regulations and CTGs under this chapter that contain continuous emission monitoring requirements, the Administrator, consistent with the requirements of this chapter, before applying such requirements to small business stationary sources, shall consider the necessity and appropriateness of such requirements for such sources. Nothing in this subsection shall affect the applicability of subchapter IV-A of this chapter provisions relating to continuous emissions monitoring.

(h) Control technique guidelines

The Administrator shall consider, consistent with the requirements of this chapter, the size, type, and technical capabilities of small business stationary sources (and sources which are eligible under subsection (c)(2) of this section to be treated as small business stationary sources) in developing CTGs applicable to such sources under this chapter.

* * *

§ 7413. Federal enforcement [CAA § 113]

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28) –

(A) issue an order requiring such person to comply with the requirements of prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a

permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by –

(A) issuing an order requiring such person to comply with such requirement or prohibition,

(B) issuing an administrative penalty order in accordance with subsection (d) of this section, or

(C) bringing a civil action in accordance with subsection (b) of this section.

(3) EPA enforcement of other requirements

Except for a requirement or prohibition enforceable under the preceding provisions of this subsection, whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A of this chapter, subchapter V of this chapter, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, plan, order, waiver, or permit promulgated, issued, or

approved under those provisions or titles, or for the payment of any fee owed to the United States under this chapter (other than subchapter II of this chapter), the Administrator may –

(A) issue an administrative penalty order in accordance with subsection (d) of this section,

(B) issue an order requiring such person to comply with such requirement or prohibition,

(C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or

(D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section.

(4) Requirements for orders

An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation and specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a

copy of such order (or notice) shall be issued to appropriate corporate officers. An order issued under this subsection shall require the person to whom it was issued to comply with the requirement as expeditiously as practicable, but in no event longer than one year after the date the order was issued, and shall be nonrenewable. No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or applicable implementation plan promulgated or approved under this chapter.

(5) Failure to comply with new source requirements

Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may –

(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies;

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action under subsection (b) of this section.

Nothing in this subsection shall preclude the United States from commencing a criminal action under subsection (c) of this section at any time for any such violation.

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

(1) Whenever such person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan or permit. Such an action shall be commenced (A) during any period of federally assumed enforcement, or (B) more than 30 days following the date of the Administrator's notification under subsection (a)(1) of this section that such person has violated, or is in violation of, such requirement or prohibition.

(2) Whenever such person has violated, or is in violation of, any other requirement or prohibition of this subchapter, section 7603 of this title, subchapter IV-A of this chapter, subchapter V of this chapter, or subchapter VI of this chapter, including, but not limited to, a requirement or prohibition of any rule, order, waiver or permit promulgated, issued, or approved under this chapter, or for the payment of any fee owed the United States under this chapter (other than subchapter II of this chapter).

(3) Whenever such person attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

Any action under this subsection may be brought in the district court of the United States for the district in which the violation is alleged to have occurred, or is occurring, or in which the defendant resides, or where the defendant's principal place of business is located, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought if the court finds that such action was unreasonable.

42 U.S.C. § 7509(b) [CAA § 179(b)]

(b) Sanctions

The sanctions available to the Administrator as provided in subsection (a) of this section are as follows:

(1) Highway sanctions

(A) The Administrator may impose a prohibition, applicable to a nonattainment area, on the approval by the Secretary of Transportation of any projects or the awarding by the Secretary of Transportation of any projects or the awarding by the Secretary of any grants, under Title 23, other than projects or grants for safety where the Secretary determines, based on accident or other appropriate data submitted by the State, that the principal purpose of the project is an improvement in safety to resolve a demonstrated safety problem and likely will result in a significant reduction in, or avoidance of, accidents. Such prohibition shall become effective upon the selection by the Administrator of this sanction.

(B) In addition to safety, projects or grants that may be approved by the Secretary, notwithstanding the prohibition in subparagraph (A), are the following –

(i) capital programs for public transit;

(ii) construction or restriction of certain roads or lanes solely for the use of passenger buses or high occupancy vehicles;

(iii) planning for requirements for employers to reduce employee work-trip-related vehicle emissions;

(iv) highway ramp metering, traffic signalization, and related programs that improve traffic flow and achieve a net emission reduction;

(v) fringe and transportation corridor parking facilities serving multiple occupancy vehicle programs or transit operations;

(vi) programs to limit or restrict vehicle use in downtown areas or other areas of emission concentration particularly during periods of peak use, through road use charges, tolls, parking surcharges, or other pricing mechanisms, vehicle restricted zones or periods, or vehicle registration programs;

(vii) programs for breakdown and accident scene management, nonrecurring congestion, and vehicle information systems, to reduce congestion and emissions; and

(viii) such other transportation-related programs as the Administrator, in consultation with the Secretary of Transportation, finds would improve air quality and would not encourage single occupancy vehicle capacity.

In considering such measures, the State should seek to ensure adequate access to downtown, other commercial, and residential areas, and avoid increasing or relocating emissions and congestion rather than reducing them.

(2) Offsets

In applying the emissions offset requirements of section 7503 of this title to new or modified sources or emissions units for which a permit is required under part D, the ratio of emission reductions to increased emissions shall be at least 2 to 1.

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§ 7602. Definitions [CAA § 302]

When used in this chapter –

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

Code of Virginia (1950), as amended.

§ 10.1-1318. Appeal from decision of Board. – A. Any owner aggrieved by a final decision of the Board under § 10.1-1309, § 10.1-1322 or subsection D of § 10.1-1307 is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).

B. Any person who is aggrieved by a final decision of the Board under § 10.1-1322, who participated, in person or by submittal of written comments, in the public comment process related to the Board's decision and who has exhausted all available administrative remedies for review of the Board's decision, shall be entitled to judicial review of the Board's decision in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). The person invoking jurisdiction under this subsection bears the burden of establishing that (i) such person has suffered an actual, threatened or imminent injury; (ii) such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized; (iii) such injury is fairly traceable to the decision of the Board and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision by the court. (1971, Ex. Sess., c. 91, § 10-17.23:2; 1986, c. 615; 1988, c. 891; 1993, 997.)

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No. 96-567

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

COMMONWEALTH OF VIRGINIA,
v. Petitioner,

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents,
and

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, ET AL.,
Intervenors.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

INTERVENORS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals properly found that the judicial review requirement of § 502(b)(6) of the Clean Air Act is constitutional, and whether the court properly deferred to EPA's interpretation of § 502(b)(6) under the principles enunciated by this Court in Chevron, USA v. Natural Resources Defense Council, 467 U.S. 837 (1984).

2. Whether the court of appeals properly found that Congress has the authority, consistent with the Commerce and Spending Clauses, and the Tenth Amendment to the Constitution, to require federal implementation and operation of the title V program of the Clean Air Act in states without an approvable program.

3. Whether the court of appeals properly found that Congress has the authority, consistent with the Commerce and Spending Clauses, and the Tenth Amendment to the Constitution, to condition receipt of federal highway funds in areas that do not meet air quality standards on the state having an approvable program, and to require additional emissions reductions from certain stationary sources of pollution in nonattainment areas.

LIST OF PARTIES BELOW

In accordance with Rule 14(b) of the Rules of the United States Supreme Court, the following is a list of the parties to the proceeding below:

The Petitioner was the Commonwealth of Virginia. The Respondents were the Administrator of the Environmental Protection Agency and the Environmental Protection Agency itself. Intervenors were the American Lung Association of Northern Virginia; the American Lung Association of Virginia; Audubon Naturalist Society; Clean Water Action*; Friends of the Rivers of Virginia; James River Association; Mountain Heritage Alliance; Valley Concerned Citizens; Virginia Chapter of the Sierra Club; Virginia Consortium for Clean Air*; Virginia Council, Trout Unlimited; Environmental Defense Fund*; Kathleen F. Derricott*; Clifton E. Derricott*; Andre L. Brown*; Caleata Johnson*; and Gwen Hedgepath*. Amici Curiae were Virginia Manufacturers Association; Washington Legal Foundation; Ogden Martin Systems of Lancaster, Incorporated; Ogden Martin Systems of Alexandria, Incorporated; National Independent Energy Producers; Ogden Martin Systems of Fairfax, Incorporated; and Chesapeake Bay Foundation.

* These are not parties to this brief in opposition to the Petition for Writ of Certiorari.

In compliance with Rule 29.1, a disclosure of corporate affiliations and Financial Interest was filed with the U.S. Court of Appeals for the Fourth Circuit on February 7, 1995. This document showed that the Intervenor organizations are not publicly owned corporations.

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STATEMENT OF THE CASE

The Clean Air Act Amendments of 1990 ("CAA") establish a national operating permit program for all major facilities that discharge air pollution. CAA § 502, 42 U.S.C. § 7661a (Pet. App. 36-48). Title V's key provision prohibits major stationary sources of air pollution from operating without a valid permit or in violation of a permit. Commonwealth of Virginia v. Browner, 80 F.3d 869, 873 (4th Cir. 1996) (Pet. App. 5).

Congress intended the permitting program to be implemented and administered at the state level, provided the state program meets certain criteria set forth in title V. Among the criteria for approval, each state must provide an opportunity for judicial review in state court of permitting decisions. CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (Pet. App. 41). Section 502(b)(6) requires that judicial review in state court be available to "any person who participated in the public comment process." CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (Pet. App. 41-42). EPA has determined that the "case or controversy" constraints of Article III of the U.S. Constitution implicitly apply to this requirement. 59 Fed. Reg. 62324, 62325 (1994).

If a state does not submit a program or if a program fails to be approved by EPA, then EPA is required to implement and operate the program in the noncomplying state. CAA § 502(d)(2)(B), 42 U.S.C. § 7661a(d)(2)(B) (Pet. App. 44). In addition, the failure to have an approvable state program triggers certain sanctions. These sanctions include an increase in pollution offset requirements already imposed on private polluters, i.e., a requirement of a 2-1 emissions offset for new or expanded stationary sources of air pollution.

A second sanction is the withholding of certain federal highway funds. CAA § 179(b), 42 U.S.C. § 7509(b) (Pet. App. 74). Both sanctions are to be imposed only in areas within the state that are not in attainment with air quality standards ("*nonattainment areas*"). *Id.*; *CAA § 173 (c)(1)*, 42 U.S.C. § 7503(c)(1). Even within the nonattainment areas, funds remain available for highway safety projects and other specific transportation projects designed to reduce air pollution from automobiles and trucks. CAA § 179(b), 42 U.S.C. § 7509(b) (Pet. App. 74).

The Commonwealth of Virginia submitted its proposed title V program to EPA on 12 November 1993. On 17 June 1994, EPA proposed disapproval of the submission, 59 Fed. Reg. 31183 (1994), and on 5 December 1994, EPA published its final disapproval. 59 Fed. Reg. at 62325 (1994). EPA's disapproval was based on the lack of adequate provision under state law for judicial review in violation of § 502(b)(6). Id.

The Commonwealth filed a petition for review on 9 January 1995 in the Court of Appeals for the Fourth Circuit. A unanimous panel of the court of appeals denied the petition, upholding EPA's disapproval of the title V program. Finding EPA's interpretation of the judicial review provision of § 502(b)(6) to be permissible, the court of appeals also held that the federal implementation provision and the title V sanctions were valid exercises of Congress' Spending and Commerce Clauses and consistent with the Tenth Amendment to the Constitution. The court of appeals denied a petition for a rehearing with a suggestion for rehearing en banc on 12 July 1996.

SUMMARY OF ARGUMENT

The court of appeals held that the Environmental Protection Agency acted lawfully when it disapproved Virginia's title V program on the grounds that it did not contain an adequate judicial review provision. The court of appeals properly found that § 502(b)(6) is constitutional, and, in accordance with the principles outlined in this Court's decision in Chevron, USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), deferred to EPA's construction of the provision.

The court of appeals also properly held that the sanctions and federal implementation provision are valid exercises of congressional authority under the Spending and Commerce Clauses. As the court stated, "[b]ecause the elimination of air pollution promotes the general welfare, Congress may tie the award of federal funds to the states' efforts to eliminate air pollution . . . . Furthermore, the Commerce Clause . . . gives Congress the power to regulate 'activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.'" Browner, 80 F.3d at 881 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282 (1981)) (Pet. App. 26).

Relying on this Court's decisions in New York v. United States, 505 U.S. 144 (1992) and Hodel, the Court also properly rejected Petitioner's Tenth Amendment attack on the statute. The Court found that the sanctions and federal implementation provisions were permissible inducements to the states to persuade them to comply with the requirements of title V. Further, the Court appropriately held, in accordance with this Court's decision in South Dakota v.

Dole, 483 U.S. 203 (1987), that the conditions on federal expenditure of funds were reasonably related to the purposes of the Clean Air Act. Because the court of appeals was correct in its analysis and holding, and because its decision is consistent with this Court's decisions, this Court should deny the petition for writ of certiorari.

ARGUMENT

I. FINDING THAT § 502(b)(6) OF THE CLEAN AIR ACT IS CONSTITUTIONAL, THE COURT OF APPEALS PROPERLY DEFERRED TO EPA'S INTERPRETATION OF THAT PROVISION.

Section 502(b)(6) of the Clean Air Act (CAA) provides for judicial review in State court of a final permit action. This provision unambiguously directs that "an opportunity for judicial review in State court of the final permit action" must be provided to "the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." CAA § 502(b)(6), 42 U.S.C. § 7661a(b)(6) (Pet. App. 41).

Section 502 further requires the Administrator of the Environmental Protection Agency (EPA) to promulgate regulations establishing the minimum elements necessary for an approvable state permit program under title V. CAA § 502(b)(1)-(10), 42 U.S.C. § 7661a(b)(1)-(10) (Pet. App. 37-43). The statute directs that these elements shall include, among other items, the provision for judicial review set forth in § 502(b)(6), and the regulations promulgated by EPA

mirror the statutory requirements. 40 C.F.R. § 70.4(b)(3)(x)(1994).

As the court of appeals stated, a literal reading of § 502(b)(6) would require that a state allow any person who participated in the public comment process to seek judicial review of permitting decisions. Browner, 80 F.3d at 877 (Pet. App. 16). EPA, however, does not require that states go that far. Instead, it has determined that the "case or controversy" constraints of Article III of the U.S. Constitution implicitly apply to the statutory and regulatory requirement that judicial review be available to "any person who participated in the public comment process." See 59 Fed. Reg. at 62325. Thus, § 502(b)(6) is satisfied if a state simply grants standing to those participants in the public comment process who would also have Article III standing to sue in federal court.

EPA disapproved the Commonwealth's title V permit program because Virginia's plan contained inadequate judicial review provisions in violation of § 502(b)(6), id. at 62324, and the court of appeals upheld EPA's action. That Virginia's law of standing fails to meet the judicial review provisions of § 502(b)(6) is not an issue in this petition.[1]

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[1] The court of appeals found that "Virginia case law makes it clear that ... [its] 'pecuniary and substantial' interest requirement is more stringent than Article III's requirement of concrete and particularized injury." Browner, 80 F 3d at 879 (Pet. App. 21-22). It based its decision on review of state law cases: Environmental Defense Fund v. Virginia State Water Control Board, 404 S.E.2d 728, 731-32 (Va. App. 1991) (standing to appeal water pollution permit denied to association of recreational users and riparian landowners); Town of Fries v. State Water Control Board, 409 S.E.2d 634, 637 (Va. App. 1991) (town lacked standing to review water pollution permit even though discharge was

Virginia's standing law under the State Air Pollution Control Act (Pet. App. 77) is flatly inconsistent with Article III requirements, much less any potentially broader requirement that standing be allowed to anyone who participated in the public comment process. [2] Rather, the issues are whether § 502(b)(6) is constitutional and whether the court of appeals properly deferred to EPA's interpretation that § 502(b)(6) is constrained by Article III.

The court found that § 502(b)(6) is constitutional on the grounds that it does not compel the states to modify their standing rules; it merely induces them to do so. Browner, 80 F.3d at 880-81 (Pet. App. 24-25). A state has the option to allow the federal government to regulate air pollution sources if it chooses not to meet the requirements of § 502(b)(6). Moreover, the court also noted that, under the Supremacy Clause, state courts may be required to apply federal law, when applicable, and to adjudicate disputes arising under federal law. Id. at 880 (Pet. App. 24).

The Commonwealth's claim that this court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), dictates a contrary result is mistaken, as the court of appeals found. In Ashcroft, the question was whether the federal Age

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directly upstream); and Citizens for Clean Air v. Commonwealth, 412 S.E.2d 715, 719-21 (Va. App. 1991) (association not aggrieved under state air law even though association members owned real estate near plant).

[2] As the court of appeals found, the provision in § 502(b)(6) that judicial review be afforded to "any other person who could obtain judicial review of that action under applicable law" preserves any state standing rule that potentially would be broader than Article III requirements. Browner, 80 F.3d at 877 (Pet. App. 16).

Discrimination in Employment Act ("ADEA"), which covered state "employees," included state judges. Id. at 464-70. Because the ADEA contained no reference to state courts or judges, this Court declined to interpret the ADEA to apply to the state judiciary. The Court's decision was based on the principle that federal courts must not imply congressional intent to alter the usual balance between federal and state powers unless congressional intent to do so is clear from the language of the statute. Id. at 470.

Unlike the situation in Ashcroft, there is no ambiguity here regarding the applicability of § 502(b)(6) to the states. As the court of appeals stated, § 502(b)(6), "[b]y its terms, could apply to *nothing but state courts*." Browner, 80 F.3d at 879 (emphasis in original) (Pet. App. 20). EPA has simply construed the reach of the standard set forth in § 502(b)(6).

Faced with EPA's interpretation that Article III case or controversy requirements implicitly constrain § 502(b)(6), the court of appeals followed this Court's decision in Chevron and deferred to the agency's interpretation. As the court stated, EPA's interpretation, if reasonable, must be upheld and take precedence over any other interpretation the parties or the court could formulate. Browner, 80 F.3d at 878 (Pet. App. 17-18).

EPA's rationale for concluding that § 502(b)(6) is tempered by Article III is that if EPA were to disapprove a state program, and thus had to implement a title V program, citizens would have access to judicial review only if they met the minimal standing requirements of Article III of the U.S. Constitution. See 59 Fed. Reg. at 62325. The court of appeals found "EPA's importation of Article III principles to resolve the slight tension within CAA § 502(b)(6) to be

reasonable." Browner, 80 F.3d at 878 (Pet. App. 18). In addition, as the court of appeals noted, the legislative history shows that Congress intended that "interested persons who arguably are affected by permit decisions are guaranteed their day in court." Browner, 80 F.3d at 877 (quoting Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean Air Act Amendments of 1990) (citations omitted) (Pet. App. 15). Thus, contrary to Petitioner's claim, the legislative history supports EPA's interpretation.

In sum, neither Petitioner's claim that EPA exceeded its discretion to interpret the standing provision as constrained by Article III nor its claim that the state is coerced into changing its standing law provides a valid reason for this Court's discretionary review.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT FEDERAL IMPLEMENTATION OF THE TITLE V PERMIT PROGRAM AND THE SANCTIONS PROVISIONS ARE VALID EXERCISES OF CONGRESSIONAL AUTHORITY.

A state's failure to submit a title V permit program or the submission of a program that fails to meet the statutory and regulatory criteria means that EPA must develop and implement its own title V permitting plan within the noncomplying state. CAA § 502(d), 42 U.S.C. 7661a(d) (Pet. App. 43-45). As the court of appeals stated, the federal government then becomes wholly responsible for the program; the state is not required to do anything to assist EPA in this effort. Browner, 80 F.3d at 873-74 (Pet. App.

6-9).[3] EPA's disapproval of a state's title V permit program also triggers certain sanctions, which include the withholding of certain federal highway funds and an increase in the pollution offset requirements already imposed on private polluters. CAA § 179(b), 42 U.S.C. § 7509(b) (Pet. App. 74-76).

Relying on this Court's decisions in New York v. United States, 505 U.S. 144 (1992); Hodel v. Virginia Surface Mining & Reclamation Ass'n 452 U.S. 264 (1981); and South Dakota v. Dole, 483 U.S. 203 (1987), the court rejected petitioner's Tenth Amendment attack on the federal implementation and sanctions provisions of the Clean Air Act. Instead, it found that such provisions were permissible inducements to the states to persuade them to comply with the requirements of title V. Thus, the court held that all of the provisions at issue comport with the requirements of the Tenth Amendment. Because the court of appeals was correct in its analysis and holding, this Court should deny the petition for certiorari.

A. The Implementation and Sanctions Provisions Comport with the Tenth

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[3] Although the court of appeals refers to federal permit implementation as a "sanction," the sanctions provision of the statute in fact includes only highway sanctions and offsets. CAA § 179(b)(1), (2), 42 U.S.C. § 7509(b)(1), (2) (Pet. App. 74-76). Instead, federal implementation is addressed in the provisions relating to submission and approval of a title V program. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3) (Pet. App. 45). If no state program has been approved two years after the required date of submission, then the EPA Administrator is required to "promulgate, administer, and enforce a [title V] program" for that state. Id.

Amendment and this Court's Analysis in *New York* and *Hodel*.

As the court below stated, the essence of a Tenth Amendment violation is that the state is commanded to regulate. Regarding the federal implementation provision, the court found no violation because "Virginia is not commanded to regulate; the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia." Browner, 80 F.3d at 882 (Pet. App. 29).[4] The court concluded that the federal implementation provision is constitutional because "'the full regulatory burden will be borne by the Federal government'". Id. (Pet. App. 29). (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 288).

In reaching this conclusion, the court stated that this Court's decision in Hodel was controlling and was in fact "the mirror image of this case." As the Court explained:

> In Hodel the federal government first implemented an environmental regulatory regime within each state but then gave each

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[4] Petitioner wrongly states that the court of appeals "evaded the Tenth Amendment issue in this case by ignoring mandatory language of Title V." Pet. Brief at 16. In fact, the court expressly addressed and rejected this contention. Browner, 80 F.3d at 883 (Pet. App. 30). Similarly, Justice O'Connor rejected a similar argument in New York, stating that courts should interpret statutes to avoid constitutional problems unless such interpretation would clearly be contrary to congressional intent. New York, 505 U.S. at 170.

> state the ability to end the federal program by implementing its own state environmental regulations that met certain criteria. In the present situation, the federal government gives the states the chance to enact their own regulations before the federal plan is imposed. For purposes of constitutional analysis, we cannot see how it makes a difference whether the federal plan is imposed first, or whether the states are given the chance to avoid imposition of the federal plan first. If anything, the CAA's method -- to give the states a chance first to avoid imposition of any federal plan ... -- seems less coercive than the program upheld in Hodel.

Browner, 80 F.3d at 882-83 (Pet. App. 29-30).

This Court's decision in New York v. United States, 505 U.S. 144 (1992), also fully supports the court of appeals' ruling that the federal implementation requirement is constitutional. In New York, this Court held that the Low Level Radioactive Waste Policy Amendments Act, as a whole, did not coerce state compliance because Congress offered the states a choice to regulate according to federal standards or have the state rules preempted by federal regulation. Id. at 167. Writing for the Court, Justice O'Connor stated that such programs give the states a choice: "they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program ...." Id. at 168.

In New York, the Court found the Act's monetary and access incentives were constitutional exercises of Congress' authority under the Commerce and Spending Clauses of the

U.S. Constitution. The third provision, however, commanded the states either to regulate according to federal statute or to take title to radioactive waste generated within its borders. Id. at 175. The Court found this provision unconstitutional because Congress may neither command the states to regulate nor compel transfer of ownership of radioactive waste from waste generators to recalcitrant states. Unlike the regulatory framework at issue here, Congress provided no option for the state to decline the federal program, thus impermissibly crossing the line from encouragement to coercion. Id. at 175-77.

By contrast, Congress in the Clean Air Act has given the states the option to decline the federal program or avoid preemption and implement their own plans that meet federal standards. Browner, 80 F.3d at 883 (Pet. App. 30). The state thus may "do nothing," leaving the federal government to implement the federal program.[5] Id. at 882 (Pet. App. 29). Under the analyses in both New York and Hodel, the court of appeals thus properly found that the CAA does not

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[5] Printz v. United States and Mack v. United States, Nos. 95-1478 and 95-1503, involving provisions of the Brady Bill, and currently under review by this Court, are distinguishable from Browner. Under the Brady Bill, Congress has directly ordered the state chief law enforcement officers to conduct background checks of persons seeking to purchase handguns until 1998 when a national background check system will be in place. Petitioner's Brief on Writ of Certiorari. Printz v. United States, Nos. 95-1478 (LEXIS, Genfed library, Briefs file). By contrast, Browner involves a program of cooperative federalism; states are not coerced but rather encouraged through a series of incentives to administer an air pollution permit program. The critical distinction between the Brady Bill provision and the CAA is that, under the CAA, states may opt not to regulate.

cross the line from inducement to coercion. Browner, 80 F.3d at 882 (Pet. App. 28-30).

The court of appeals also correctly determined that the sanctions provisions, which trigger withholding of federal highway funding, discussed in Section II.B. infra, and which impose a 2-1 emissions offset, are within congressional authority and do not violate the Tenth Amendment. Congress may develop incentives to encourage state implementation so long as each is a proper exercise of congressional authority. See New York, 505 U.S. at 166-68.

In this case, the court of appeals found that the requirement of a 2-1 emissions offset for new or expanded sources of stationary pollution in nonattainment areas did not pose a Tenth Amendment concern because it applies to private pollution sources, not states. Browner, 80 F.3d at 882 (Pet. App. 28). This sanction thus does not burden the state as a governmental unit but falls on private parties. As Justice O'Connor wrote in an analogous situation, such action "does not violate the Tenth Amendment, for it merely pre-empts state control of private conduct, rather than regulating the 'States as States'." FERC v. Mississippi, 456 U.S. 742, 775 n.1 (1981) (Justice O'Connor concurring in part, dissenting in part).

There is also no basis for the Commonwealth's contention that the court of appeals' analysis is faulty for allegedly failing to assess the cumulative effects of the sanctions. To the contrary, the court of appeals properly followed this Court's decision in New York, which requires an analysis of each individual incentive to determine whether it is a proper exercise of congressional authority under the Constitution.

In addition, petitioner's assertion that the sanctions are coercive because they will continue after a federally implemented program is in place is also without merit. Congress clearly has the authority under its Commerce and Spending Clauses, as the court of appeals found, directly to impose restrictions designed to reduce overall pollution, such as the 2-1 emissions offset and the withholding of federal funds for transportation projects that increase use of the automobile. Browner, 80 F.3d at 882 (Pet. App. 28). Accordingly, it is well within Congress' authority to impose these restrictions as sanctions if the federal government must bear the full responsibility for implementation in the event that the state chooses not to administer the title V program.[6]

B. The Court of Appeals Properly Relied on this Court's Ruling in *South Dakota v. Dole* in Holding that Congress Could Condition Receipt of Federal Highway Funds on Compliance with the Requirements of Title V.

The court of appeals also properly held that the highway sanction is a valid exercise of congressional authority under the Spending and Commerce Clauses.

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[6] Moreover, Petitioner erroneously states that EPA has the option under section 113 of the CAA to take administrative, civil and criminal action against a noncomplying State. Pet. Brief at 20. As the court of appeals noted, section 113 deals not with disapproval of a permit program but with "State Failure to enforce SIP or permit program." It explicitly applies only after a program has been approved, and then only to "violations of . . . an approved permit program." Browner, 80 F.3d at 881 n.6 (Pet. App. 25) (citing CAA § 113, 42 U.S.C. § 7413) (Pet. App. 68).

Browner, 80 F.3d at 881 (Pet. App. 26-27). As the court of appeals stated, "[b]ecause the elimination of air pollution promotes the general welfare, Congress may tie the award of federal funds to the states' efforts to eliminate air pollution . . . . Furthermore, the Commerce Clause . . . gives Congress the power to regulate 'activities causing air or water pollution, or other environmental hazards that may have effects in more than one state.'" Id. (quoting Hodel, 452 U.S. 264, 282 (1981)).

Having determined that the withholding of federal funds was validly based on the Spending and Commerce Clauses, the court of appeals analyzed the sanction under this Court's decision in South Dakota v. Dole, 483 U.S. 203, 211 (1987), to determine whether Congress overstepped its bounds under the Tenth Amendment. The court's analysis involved two inquiries. First, whether "the financial inducement offered by Congress [is] so coercive as to pass the point at which 'pressure turns into compulsion.'" Browner, 80 F.3d at 881 (quoting South Dakota, 483 U.S. at 211) (Pet. App. 26). Second, whether the conditions to which the federal funds are subject are "'reasonably related to the purpose for which the funds are expended.'" Id. (quoting South Dakota, 483 U.S. at 213).

First, the court of appeals properly held that the highway sanction "does not rise to the level of 'outright coercion.'" Browner, 80 F.3d at 882 (Pet. App. 27). As the court explained, a state does not lose any highway funds that would be spent in areas of the state that are in attainment. Browner, 80 F.3d at 881 (Pet. App. 27). The withholding of federal funds only applies to projects that would increase pollution in areas of the state that do not meet air quality standards. And, even within these nonattainment areas, eight

exemptions allow federal funding for a variety of projects designed to promote safety or reduce air pollution. Id. These exemptions include: (1) public transit capital programs; (2) construction of highways or lanes for buses or other high occupancy vehicles; (3) employee work-trip-related reductions; (4) projects to improve traffic flow and reduce emissions; (5) fringe and corridor parking projects; (6) vehicle control programs for downtown or congested areas; (7) vehicle management and information systems to reduce congestion and emissions; and (8) any other transportation related programs that would improve air quality and not encourage single occupancy vehicle use. CAA § 179(b)(1)(A)&(B), 42 U.S.C. § 7509 (b)(1)(A)&(B) (Pet. App. 74-75).

Moreover, the court noted that the highway sanction is less severe than other sanctions upheld in other cases. Id. at 881-82 (Pet. App. 27). For example, under the statute in New York, a claim to all federal grants was forfeited if certain milestones were missed. See New York, 505 U.S. at 173. Similarly, in Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989), all federal highway funding was withheld unless the state posted a maximum speed limit of 55 miles per hour on all roads, including those that were not part of the federal interstate network.

Second, the court of appeals found that the highway funding conditions are "reasonably related" to the goal of reducing air pollution. Browner, 80 F.3d at 882 (Pet. App. 28). As the court stated:

> The CAA as a whole is a comprehensive scheme to cope with the problem of air pollution from all sources. Congress may

> ensure that funds it allocates are not used to exacerbate the overall problem of air pollution. It is therefore of no consequence that a highway sanction, which will have the effect of reducing emissions from mobile pollution sources, is being used to induce compliance with a portion of the Act designed to reduce emissions from stationary sources.

Id. (Pet. App. 28).

The court's analysis is correct. The legislative history of the Clean Air Act is replete with references to the impact of vehicle emissions on air quality. See, e.g., H. Rep. No. 101-490, 101st Cong., 2d Sess. 4 (1990). In furtherance of the Clean Air Act's goals and in order to persuade states to implement the statute, Congress conditioned receipt of federal transportation funds in nonattainment areas on an approvable state title V program for stationary sources and an adequate state implementation plan (SIP) for mobile (vehicle) emissions. The EPA Administrator is instructed to apply the sanctions provisions both to nonapproved title V programs and to inadequate SIPs. The highway funding sanctions will further reduce pollution from vehicles in the most polluted areas of the state. Thus, the conditions clearly "bear some relationship to the purpose of the federal spending." New York, 505 U.S. 144 at 167.

CONCLUSION

Rule 10(c) of the Rules of this Court provides that a writ of certiorari will be granted only for compelling reasons. Because there are no such compelling reasons in this case, this Court should refuse to exercise its discretion to hear this case. In particular, the court of appeals properly applied the

principles that this Court enunciated in Chevron in deferring to EPA's interpretation of the Clean Air Act to limit standing according to Article III of the U.S. Constitution. The court of appeals also properly found title V to be a valid exercise of congressional authority under the Commerce and Spending Clauses and consistent with the Tenth Amendment principles. Because the court's decision is also fully consistent with the precedent of this Court, including New York v. United States, Hodel v. Virginia Surface Mining & Reclamation Ass'n., and South Dakota v. Dole, and is in conflict with no other reported federal circuit case, this Court should deny the petition for writ of certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency's disapproval of Virginia's Title V operating permit program was contrary to law, where the Clean Air Act requires that an approvable state permit program provide "an opportunity for judicial review in State court of the final [state] permit action by * * * any person who participated in the [state] public comment process," 42 U.S.C. 7661a(b)(6), but Virginia's permit program provides for judicial review only on a much more restricted basis.

2. Whether Clean Air Act incentive provisions that encourage state participation in Clean Air Act programs, by (a) conditioning the availability of certain federal highway funds and (b) requiring additional pollution reductions before certain major new stationary sources of air pollution may be constructed, if Virginia does not adopt a minimally acceptable Title V permit program, violate the Tenth Amendment and related constitutional principles of federalism.

3. Whether Clean Air Act incentive provisions that condition the availability of certain federal highway funds to Virginia on the State's adoption of a minimally acceptable Title V permit program violate the Spending Clause of the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-567

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 80 F.3d 869.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1996. A petition for rehearing was denied on July 12, 1996. Pet. App. 33-34. The petition for a writ of certiorari was filed on October 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, enacted in 1970 and extensively amended in 1977 and 1990, establishes a joint state and federal program to control the Nation's air pollution. Section 109 of the CAA, 42 U.S.C. 7409, requires the Environmental Protection Agency (EPA) to establish primary and secondary national ambient air quality standards (NAAQS) for certain pollutants, such as carbon monoxide, nitrogen dioxide, and ozone, that are necessary to protect public health and welfare. Section 110, first enacted in 1970, contemplates that States will apply the measures necessary to attain the NAAQS to individual sources of air pollution through a State Implementation Plan (SIP) prepared by each State, subject to EPA review and approval. 42 U.S.C. 7410. A SIP must specify emission limitations and other measures necessary to attain and maintain the NAAQS for each pollutant for each "air quality control region" within the State. 42 U.S.C. 7410(a)(2)(A)-(M). If a State fails to submit a SIP, or if EPA disapproves a SIP, and that failure is not remedied within the time period set by the Act, then EPA must promulgate and implement a federal implementation plan (FIP) for the air quality control region in lieu of the state plan. 42 U.S.C. 7410(c). Beginning with the CAA Amendments of 1977, air quality control regions were designated as either "attainment" or "nonattainment" areas, depending upon whether they met the NAAQS for a particular pollutant. 42 U.S.C. 7407.[1]

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[1] The 1990 CAA Amendments classified nonattainment area according to the severity of air pollution. Ozone nonattainment areas were classified as marginal, moderate, serious, severe, and extreme. 42 U.S.C. 7511a. For each type of pollutant and area classification, the Act specifies a number of different programs for States to adopt in their SIPs to achieve attainment with the NAAQS. See generally

As part of the 1990 CAA Amendments, Congress added a new Title V, establishing an operating permit program. 42 U.S.C. 7661-7661f. In order to improve stationary source compliance with the CAA requirements, Title V requires that all applicable requirements for certain stationary sources of air pollution, including those contained in an approved SIP, be included in a single comprehensive permit document for each source. See, *e.g.*, 136 Cong. Rec. S16,983 (daily ed. Oct. 27, 1990); H.R. Conf. Rep. No. 952, 101st Cong., 2d Sess. 345 (1990). Sources subject to the Title V program are prohibited from operating without, or in violation of, an operating permit containing all of the applicable CAA requirements. 42 U.S.C. 7661a(a).

Title V contemplates that States will develop, under their own state statutes and/or local laws or regulations, operating permit programs to be implemented within their borders, and submit those programs to EPA for approval. 42 U.S.C. 7661a(d)(1). Generally, EPA reviews a submitted state Title V permit program, and after notice and comment rulemaking procedures, EPA either approves or disapproves the program. *Ibid.* Section 502(b) of the CAA requires that approvable state permit programs include certain "minimum elements," which EPA is charged to codify and further refine by regulation. That provision requires that

> [t]hese elements shall include each of the following: * * * (6) Adequate, streamlined, and reasonable procedures * * * for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, * * * *including an opportunity for judicial review in State court of*

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42 U.S.C. 7502, 7511a(a)-(e). Virginia has four areas that are out of attainment with the ozone NAAQS and one area out of attainment with the carbon monoxide NAAQS.

> *the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.*

42 U.S.C. 7661a(b)(6) (emphasis added).

2. Influenced in part by a suggestion in *District of Columbia* v. *Train*, 521 F.2d 971, 992-993 (D.C. Cir. 1975), vacated and remanded for consideration of mootness *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam), Congress first adopted incentives in 1977 to encourage state participation in CAA programs.[2] In the 1990 CAA Amendments, Congress built upon the Act's existing system of incentives to encourage state participation in the CAA's joint regulatory scheme. The Act now provides for so-called "sanctions" that apply if States fail to adopt within the statutory time frame various CAA programs, including the Title V Operating Permit Program, that meet minimum federal standards.

The mandatory sanction provisions operate by an 18-month sanction "clock," which is triggered if a State fails to submit a Title V permit program by the required date, 42 U.S.C. 7661a(d)(2)(B), if a program submittal is disapproved by EPA, *ibid.*, or if the State fails to administer and enforce an approved program adequately, 42 U.S.C. 7661a(i)(2). If the 18-month "clock" expires without the deficiency having been remedied, one of two sanctions

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[2] See H.R. Rep. No. 294, 95th Cong., 1st Sess. 290 (1977) (citing *Train*). Specifically, Congress conditioned the availability of certain federal highway funds and placed certain limitations on the ability to construct or modify certain air pollution sources upon whether a State chooses to adopt or implement certain substantive provisions of the Act, including state adoption of SIPs that conform with certain minimum federal requirements. See 42 U.S.C. 7503, 7506 (1988). See also, *e.g.*, *New Mexico Envtl. Improvement Div.* v. *Thomas*, 789 F.2d 825 (10th Cir. 1986).

must be applied. 42 U.S.C. 7661a(d)(2)(B) (incorporating sanctions provided for in 42 U.S.C. 7509(b)), 7661a(i)(2) (same). A second sanction must be imposed six months after the first sanction if the deficiency still has not been corrected. See 42 U.S.C. 7509(a).[3]

The two sanctions available under Title V are set forth in Section 179(b) of the CAA, 42 U.S.C. 7509(b). First, the EPA Administrator may direct the Secretary of Transportation not to approve certain projects or to provide certain federal highway funds under Title 23. 42 U.S.C. 7509(b)(1). That highway funding sanction applies only to projects in nonattainment areas in the State. *Ibid.* In addition, the highway funds sanction is subject to a number of exemptions for specific types of projects, such as those that promote safety, capital grants for public transit, certain types of programs that improve traffic flow and achieve a net reduction in emissions of air pollutants, and programs that the EPA Administrator and the Secretary of Transportation determine would improve air quality and would not encourage single occupancy vehicle capacity. *Ibid.* Thus, even where the highway funds sanction is imposed under Title V, a State may obtain all available federal highway funds by submitting projects that fall within one or more of the exemptions or that would be undertaken solely within attainment areas of the State.

The second available sanction is the "offset" sanction. 42 U.S.C. 7509(b)(2). When that sanction applies, a major

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[3] Before any sanction may be imposed under Title V, EPA must select which of the two available sanctions would apply first. That determination would be made pursuant to notice and comment rulemaking procedures, and the Agency's determination would be reviewable in the courts of appeals. 42 U.S.C. 7607(b)(1). To date, EPA has not taken such regulatory action with respect to Title V, and thus the sanctions under Title V have not been applied to Virginia or to any other State.

new or modified stationary source of air pollution subject to the nonattainment new source review program under Section 173 must show, in order to obtain a permit to construct or modify the source, that certain emissions from other sources will be reduced by at least twice as much as the amount of the increased emissions from the new or modified source. That 2:1 ratio is an increase from the 1.15:1 ratio that would otherwise apply in a moderate ozone nonattainment area (see 42 U.S.C. 7511a(b)(5)) and the 1.2:1 ratio that would otherwise apply in a serious ozone nonattainment area (see 42 U.S.C. 7511a(c)(10)).[4]

Finally, if a State's Title V program has not been approved within two years from the date by which the State should have submitted it, EPA must promulgate, administer, and enforce a federal Title V program for the State. 42 U.S.C. 7661a(d)(3) and (i)(4).

3. EPA's final disapproval of Virginia's Title V permit program, 59 Fed. Reg. 62,324 (1994) (C.A. App. 85), was based upon the failure of that program to satisfy five requirements. Of particular relevance here, EPA concluded that the Virginia scheme did not provide adequate opportunity for judicial review at the behest of "any person who participated in the public comment process" under Section 502(b)(6), 42 U.S.C. 7661a(b)(6).[5] Although

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[4] In applying the offset sanction under Title V, the increased emission reductions ratio applies only to designated nonattainment areas, and then only to the pollutants for which the area has been designated nonattainment. Thus, new or modified major stationary sources located in attainment areas, or sources in nonattainment areas that only emit other pollutants, would not be affected. See 42 U.S.C. 7661a(d)(2)(C) and (i)(3).

[5] The other four deficiencies noted by EPA were: First, Virginia's program failed to prevent the default issuance of permits, as required by 42 U.S.C. 7661d(b)(3); see 42 U.S.C. 7661a(b)(5)(F) and 40 C.F.R. 70.8(e). Second, Virginia's submitted regulations necessary to imple-

that provision could be read to require States to dispense with standing requirements altogether for participants in the public comment process seeking to obtain judicial review, EPA adopted an interpretation more favorable to petitioner. It interpreted Section 502(b)(6) to require that, for a state permit program to be approvable, the program must at a minimum extend judicial review rights to those who could obtain judicial review if EPA administered the program—namely, participants in the state public comment process who would satisfy the standard for standing in federal court under Article III of the United States Constitution. Nonetheless, EPA concluded that Virginia's scheme remained inadequate because it offers judicial review of final permit decisions to public commenters only if they demonstrate an "immediate, * * * pecuniary and substantial interest," Va. Code Ann. § 10.1-1318(B) (Michie 1993).[6] See 59 Fed. Reg. 62,325-62,326 (1994) (C.A. App. 86-87).

4. a. Petitioner filed a petition for review in the court of appeals, challenging EPA's final disapproval of petitioner's

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ment the permit program failed to meet the requirements of 40 C.F.R. 70.4(b)(3) because the state regulations were due to expire on June 28, 1994, and had not been renewed. Third, Virginia's program exempted from the permit requirement certain sources that are required to be covered by the Title V regulations. See 40 C.F.R. 70.3(a) and (b). Fourth, Virginia's permit program failed to assure that permits would contain all applicable CAA requirements and incorrectly delineated the terms of permits that are enforceable only by Virginia. 59 Fed. Reg. 31,185 (1994) (C.A. App. 83).

[6] Virginia's Title V permit program judicial review provision, Va. Code Ann. § 10.1-1318 (Michie 1993), is reproduced at Pet. App. 77. The portions relevant here limit judicial review to persons "who participated * * * in the public comment process," if such persons have "suffered an actual, threatened or imminent injury" where "such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized."

Title V permit program. Petitioner did not contest or challenge the merits of four of the five independent deficiency findings upon which EPA based its disapproval of petitioner's Title V permit program. See note 5, *supra*. Accordingly, the court of appeals properly concluded that it could affirm EPA's disapproval on the basis of those four findings alone, provided that the statute is constitutional. Pet. App. 11.

b. Petitioner argued that the remaining, fifth basis for EPA's disapproval, regarding the limited judicial review rights petitioner established for its permit program, was contrary to Section 502(b)(6). Petitioner asserted that its permit program judicial review provision satisfies Section 502(b)(6).[7]

Section 502(b)(6) establishes three categories of persons who must be entitled to judicial review in state court, if a state permit program is to be approvable: "[1] the applicant, [2] any person who participated in the public comment process, and [3] any other person who could obtain judicial review of that action under applicable law." The parties agreed that the phrase "applicable law" in Section 502(b)(6) refers to state law. See 40 C.F.R. 70.4(b)(3)(x). Petitioner argued that the statute should be read to require judicial review at the behest of individuals in the second category—participants in the public comment process—only if they could show that they "could obtain

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[7] Since the court of appeals' decision, Virginia has conditionally amended the judicial review provision in order to correct the deficiency. Virginia's new provision, however, will not become effective "unless and until a final and unappealable decision of a court of competent jurisdiction has declared that [Virginia's permit program judicial review provision] as it is currently effective does not meet the requirements for state program approval under Title V." 1996 Va. Acts Ch. 1032, Cl. 3 (see Va. Code Ann. § 10.1-1318 note (Michie Supp. 1996)).

judicial review * * * under applicable [*i.e.*, state] law" pursuant to the third category. Petitioner thus argued that its judicial review provision for its air permit program, Va. Code Ann. § 10.1-1318 (Michie 1993)—and presumably each of the other potentially differing and narrower judicial review provisions in each of the other States—must be approved by EPA, no matter how they restrict standing of public comment participants to obtain judicial review.

c. The court of appeals rejected petitioner's argument as an impermissible reading of the statute, contrary to the plain meaning of Section 502(b)(6). Pet. App. 15-16. Applying the "last antecedent" rule, the court of appeals concluded that the phrase "under applicable [state] law" contained in the third category of Section 502(b)(6) modifies only that category of persons ("any other person who could obtain judicial review of that action under applicable law"), not the second category ("any person who participated in the public comment process"). The court further reasoned that petitioner's interpretation would render "mere surplusage" the plain language of Section 502(b)(6), since "then there would have been no need for Congress to have included the first two categories. The statute could have been written simply to say that standing should be given to 'any person' who complied with state standing rules." Pet. App. 16. Therefore, the court interpreted the first two categories in Section 502(b)(6) to establish a minimum, nationwide level of judicial review that all federally approvable state Title V permit programs must satisfy. The court concluded that the third category serves as a catch-all provision, allowing States to "grant broader standing rights than those otherwise required under federal law" and "ensur[ing] that the CAA does not inadvertently diminish standing rights previously granted under state laws." Pet. App. 16.

The court of appeals further stated that EPA's interpretation of the rights of public comment participants to obtain judicial review under Section 502(b)(6) is "both authorized by Congress and reasonable." Pet. App. 21. Specifically, the court approved EPA's determination that a state program can be approved even if it does not grant standing to *all* participants in the public comment process, so long as the State "grants standing * * * to those participants * * * who would have Article III standing to sue in federal court." *Id.* at 17. The court stated that EPA's interpretation harmonized the three categories of the judicial review provision in Section 502(b)(6) "with the portion that requires states to provide '[a]dequate, streamlined, and reasonable procedures.'" Pet. App. 18 (quoting Section 502(b)(6)). The court also noted that the EPA interpretation is practical to apply, Pet. App. 18, best preserves the uniform and minimum judicial review rights Congress intended to preserve in Section 502(b)(6), and best satisfies the policy goals of that provision, Pet. App. 22-23. The court of appeals further held that petitioner's permit program judicial review provision is more restrictive than that minimum standard.[8]

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[8] The court of appeals reviewed state case law establishing that Virginia courts apply a "pecuniary interest" test—the same test embodied in Virginia's Title V statute—and other restrictive rules to defeat judicial review rights of persons who would have met Article III's standing requirement. Among those denied judicial review rights were participants in the public comment process who were located downwind from permitted air pollution sources and downstream from permitted water pollution sources. Pet. App. 21-22 (discussing *Fries* v. *State Water Control Bd.*, 409 S.E.2d 634, 637 (Va. Ct. App. 1991) (holding that "an anticipated public injury" was not "an immediate, pecuniary, and substantial interest"); *Citizens for Clean Air* v. *Commonwealth*, 412 S.E.2d 715, 719-721 (Va. Ct. App. 1991); *Environmental Defense Fund* v. *Virginia State Water Control Bd.*, 404 S.E.2d 728, 731-732 (Va. Ct. App. 1991)). The court of appeals noted that a "plain-

d. The court of appeals also rejected petitioner's argument that the "plain statement" rule enunciated in *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991), should apply to preclude deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), to EPA's interpretation of Section 502(b)(6). The court did not decide whether state judicial standing rules fall within the core of state sovereignty identified in *Gregory*, federal intrusion upon which triggers the plain statement rule. Pet. App. 20, 24-25. Instead, the court held that, even if the fundamental state sovereignty concerns in *Gregory* were invoked, "[t]hat principle has no relevance in this case because here it is manifestly clear that Congress specifically intended that the states conform their judicial standing rules to meet the § 502(b)(6) standard." *Id.* at 19. Moreover, the court distinguished *Gregory* because "the CAA does not compel the states to modify their standing rules, it merely induces them to do so." *Id.* at 25. The statute at issue in *Gregory*, by contrast, would have directly applied certain qualifications for state law judges, absent application of the plain statement rule.

5. The court of appeals rejected petitioner's arguments that the "sanction" provisions (the highway funds and offset sanctions) violate the Tenth Amendment, the Spending Clause, and related constitutional principles of federalism.

a. The court of appeals rejected petitioner's contention that the CAA violates the Tenth Amendment by ordering the state legislature to adopt an approvable Title V per-

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tiff need not show 'pecuniary' harm to have Article III standing; injury to health or to aesthetic, environmental, or recreational interests will suffice." Pet. App. 21 (citing *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-687 (1973), and *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972)).

mit program through direct compulsion. The court held that, although the CAA's "sanctions provisions potentially burden the states, those sanctions amount to inducement rather than 'outright coercion.'" Pet. App. 25 (quoting *New York* v. *United States*, 505 U.S. 144, 166 (1992)). See also Pet. App. 30-31. The court also held that Section 113 of the CAA, 42 U.S.C. 7413, which sets out EPA's enforcement authority under the CAA, "may not be used to force Virginia to promulgate any state permit program, and EPA has not proposed invoking § 113 in this case." Pet. App. 25 n.6.

b. As an alternative to its express mandate argument, petitioner asserted in the court of appeals that the additional limitations imposed on highway funding under the CAA highway funds sanction provision exceed Congress's constitutional authority under the Spending Clause. Petitioner argued that the impact on the Commonwealth if the highway funds sanction were applied would be so severe that, under *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the incentive would "pass the point at which 'pressure turns into compulsion,'" *id.* at 211 (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). Petitioner also argued that the relationship between the condition imposed on the use of federal highway funds (submittal of an approvable Title V permit program) and the purpose of federal highway funding is constitutionally inadequate under the Spending Power.

Rejecting petitioner's first argument, the court of appeals noted that "[n]o court * * * has ever struck down a federal statute on grounds that it exceeded the Spending Power." Pet. App. 27. The court of appeals also concluded that any financial impacts on Virginia's economy would not be so severe that, under *Dole*, they would rise to the level of "outright coercion." *Ibid.* The court of appeals correctly noted that federal funding would not be

limited in certain areas of Virginia, that federal funding would remain available in all areas for certain safety-related and pollution-reducing projects, and that petitioner could shift federal highway funds around in order to take advantage of those provisions. *Ibid.*

The court of appeals also rejected petitioner's argument that there is an inadequate relationship between the highway funds sanction and petitioner's failure to submit an approvable Title V permit program. The court explained that Title V of the CAA directly addresses air pollution from stationary sources, while the highway funds sanction pertains to many of the same pollutants from mobile sources. It concluded that "[t]he CAA as a whole is a comprehensive scheme to cope with the problem of air pollution from all sources. Congress may ensure that funds it allocates are not used to exacerbate the overall problem of air pollution." Pet. App. 28.

c. The court of appeals also rejected petitioner's arguments that the offset sanction violates the Tenth Amendment and related principles of federalism. The court concluded that the sanction does not directly compel the States to enact and enforce a federal regulatory program, in violation of *New York*, 505 U.S. at 161, 188. The court rejected petitioner's argument that the alleged impacts of this sanction are germane to the constitutional issues raised, holding that as allowed under *New York* the offsets involve direct regulation of private parties under the Commerce Clause and do not affect the "State as a sovereign," *id.* at 174. The court concluded that "[t]he burden of the offset sanction falls on private parties. * * * [I]t does not burden Virginia as a *governmental* unit. For this reason, the sanction does not violate the principles of federalism embodied in the Tenth Amendment." Pet. App. 28.

ARGUMENT

The court of appeals correctly held that Congress intended that state permit programs not be federally approved unless they conform to the nationwide standards for judicial review that Congress established in Section 502(b)(6) of the Clean Air Act (CAA), 42 U.S.C. 7661a(b)(6). The court of appeals also correctly held that Congress's determination to use its Spending and Commerce Powers to induce the States to establish Title V permit programs does not violate the Tenth Amendment. Neither ruling conflicts with any decision of this Court or any other court of appeals, and neither ruling warrants further review.[9]

1. In *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), this Court held that Congress must provide a "plain statement" of its intent if it wishes directly to constrain fundamental state decisions in a core area of state sovereignty.[10] Petitioner's contention (Pet. 10-16) that the court of appeals improperly applied that rule while interpreting Section 502(b)(6) lacks merit.

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[9] The constitutionality of the CAA sanction provisions has been raised in at least two other cases pending in the courts of appeals. See *Missouri* v. *United States*, 918 F. Supp. 1320 (E.D. Mo. 1996), appeal pending, No. 96-2244 (8th Cir.); *Commonwealth of Virginia* v. *EPA*, Nos. 95-1150, 95-1163 & 95-1177 (D.C. Cir.). If and when a court of appeals decision in those cases or in some other case creates a conflict in the circuits, review by this Court could be sought to resolve it.

[10] The specific question in *Gregory* was whether a statutory exception to the mandatory retirement provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, applied to state judges, even though the statute contained no express reference to state courts or judges. Given the obvious ambiguity in the statute, this Court applied the plain statement rule in *Gregory* to avoid a potentially difficult constitutional question under the Tenth Amendment and related principles of federalism. See 501 U.S. at 464.

a. This case provides no occasion for further delineation of the types of "fundamental" state decisions or circumstances in which the "plain statement" rule in *Gregory* should apply. That is because Section 502(b)(6) already contains an entirely plain statement that restrictive standing requirements such as those embodied in petitioner's proposed scheme are insufficient to satisfy the federal statutory standard.

As noted above, Section 502(b)(6) provides for judicial review at the behest of three classes of individuals: "[1] the applicant, [2] any person who participated in the public comment process, and [3] any other person who could obtain judicial review of that action under applicable law." Under the plain language of that provision, all permit applicants and those who "participated in the public comment process" are entitled to judicial review; other individuals (*i.e.*, nonparticipants) are entitled to judicial review only if they can show that they "could obtain judicial review * * * under applicable [*i.e.*, state] law." Although the statute thus permits States to require *non*-participants to show that they satisfy state law standing requirements, the statute is unequivocal that States may not use state law standing restrictions applicable to non-participants to eliminate the opportunity for participants to obtain judicial review.[11] It is difficult to imagine how

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[11] Petitioner asserts (Pet. 14) that Section 502(b)(6) "is undisputedly ambiguous * * * regarding Congress' intent to force states to adopt a different judicial review standard [from that ordinarily applicable under state law]." The text of the statute, however, makes clear that that was precisely Congress's intent. Moreover, as the court of appeals recognized, that intent is also clear from the legislative history of the statute, see Pet. App. 16 (quoting 136 Cong. Rec. S16,941 (daily ed. Oct. 27, 1990)), and from the application of the "last antecedent" rule of statutory construction, see Pet. App. 15. In addition, petitioner's theory of the meaning of Section 502(b)(6) does not give independent meaning

Congress could have stated that intent more plainly. As the court of appeals stated, "[t]h[e] principle [of *Gregory*] has no relevance in this case because here it is manifestly clear that Congress specifically intended that the states conform their judicial standing rules to meet the § 502(b)(6) standard." Pet. App. 19.

Petitioner does not dispute before this Court that petitioner's permit program judicial review provision fails to satisfy the plain language of Section 502(b)(6). Nor does petitioner offer any other interpretation of the language of Section 502(b)(6) under which petitioner's restrictions on judicial standing for those who participated in the public comment process could possibly be found to satisfy Section 502(b)(6). Instead, petitioner notes (Pet. 12) that EPA has interpreted the second prong of Section 502(b)(6) to broaden slightly the scope of permissible state standing requirements for participants in the public comment process. Petitioner then argues (Pet. 13) that *Gregory* has some relevance to this case because the EPA's "interpre-

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to each of the statute's terms. See Pet. App. 16. Under petitioner's theory, a state permit program would satisfy Section 502(b)(6) by simply providing for judicial review at the behest of the third category of persons listed in Section 502(b)(6)—persons "who could obtain judicial review * * * under applicable [*i.e.*, state] law." The other two categories—"the applicant" and "any person who participated in the public comment process"—would be superfluous, since persons in those categories could obtain judicial review, under petitioner's theory, only if they also fell within the third category. Indeed, under petitioner's theory, Congress could have accomplished the same result by eliminating the references to *all three* categories of individuals in Section 502(b)(6). That would have had the effect of leaving the question of standing to obtain judicial review entirely up to state law—which is exactly the result of the interpretation for which petitioner contends and exactly the result that Congress expressly precluded in Section 502(b)(6).

tation would displace or intrude into some essential core function of state sovereignty."

Petitioner's argument is mistaken. EPA's interpretation of the statute does not "displace or intrude into some essential core function of state sovereignty." To the contrary, EPA's interpretation of the statute *accommodates* concerns of state sovereignty (insofar as they are implicated at all here) by permitting States to deny judicial review to participants in the public comment process who would not satisfy Article III standing requirements. Under the only other plausible reading of Section 502(b)(6), the States would have to go still further in granting standing to *anyone* who participated in the state public comment process. EPA cannot be said to have "displace[d] or intrude[d] into some essential core function of state sovereignty" by relieving States of that burden.[12]

Nor does the fact that Section 502(b)(6) is sufficiently ambiguous in its precise application to warrant deference to EPA's interpretation support petitioner's argument that the statute could support its theory that States may impose whatever standing requirements they wish on those seeking judicial review. There is nothing exceptional in the court of appeals' holding that the meaning of a statutory provision is plain enough to render certain constructions (such as petitioner's) plainly impermissible, while remaining sufficiently ambiguous as to other constructions to make deference to the agency's interpretation appropriate.

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[12] We note that petitioner also asserts in its petition that apart from its contest over the judicial review provision, it has corrected the other four (of the five) deficiencies in its program. Pet. 7 n.4. At the present time, however, EPA has not yet concluded a rulemaking as to the adequacy of those new submissions. Thus, those other four deficiencies alone remain a valid basis for EPA's disapproval of petitioner's permit program. See Pet. App. 9-12.

b. Additional review of the court of appeals' application of *Gregory* is not warranted for another, independent reason. The plain statement rule in *Gregory* was adopted to avoid difficult constitutional problems posed by interpretations of federal statutes that would directly impose mandatory federal requirements that infringe upon a fundamental state sovereign function (*i.e.*, the qualifications of state judges). See, *e.g.*, 501 U.S. at 455, 460. As discussed below, the Title V state permit program provisions, including Section 502(b)(6), do not apply by direct mandate, but rather through a system of incentives. Thus, even if state law control over permit program judicial review provisions were considered to be a fundamental element of state sovereignty, the Clean Air Act structure nonetheless ensures that these Tenth Amendment and related principles of federalism are not transgressed.

2. Petitioner also contends (Pet. 17) that the CAA statutory scheme unconstitutionally "commandeer[s] the legislative process of the States to enact and administer a federal operating permit program." That contention is mistaken.

a. The Tenth Amendment prohibits the federal government from "commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161, 188 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). On the other hand, Congress may "encourage a State to regulate in a particular way," and may "hold out incentives to the States as a method of influencing a State's policy choices." 505 U.S. at 166. That is what Congress has done in Sections 179(b) and 502(d) and (i) of the CAA, 42 U.S.C. 7509(b), 7661a(d) and (i). The offset sanction is a conditional federal regulation, under the Commerce Clause, of private activity over which Congress possesses unquestioned au-

thority. Thus, like the conditional exercise of Commerce Clause authority upheld in *New York*, the offset sanction's burden falls on private parties, not States as sovereigns. 505 U.S. at 174.[13] In such circumstances, "[t]he affected States are not compelled by Congress to regulate." *Ibid.*

Similarly, Congress may attach conditions to a State's receipt of public funds without violating the Tenth Amendment, as Congress has done with the CAA's highway funds sanction.

> By either of these methods [conditional funding or conditional federal preemption], as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.

New York, 505 U.S. at 168. As the court of appeals correctly stated, "we find no constitutional violation because federal law 'may, indeed, be designed to induce state action in areas that otherwise would be beyond Congress' regulatory authority.'" Pet. App. 23 (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982)).

b. Petitioner argues (Pet. 16) that the CAA should be read as imposing a direct, enforceable mandate that States

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[13] The two sets of incentives upheld in *New York* establish a number of different inducements to encourage state participation. 505 U.S. at 152-154 (describing the incentives). The second set of incentives upheld in *New York* included federal regulations similar to the CAA offset sanction. They authorized the imposition of increased costs, as well as certain restrictions on private persons, if States do not regulate according to certain federal standards. The Court held that it was constitutional for Congress to exercise its Commerce Clause power by directly regulating private persons on a conditional basis. *Id.* at 173-174.

adopt and submit Title V permit programs to EPA. This Court's decision in *New York*, however, rejected a precisely parallel argument, applying the long-standing rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." 505 U.S. at 169-170 (citation omitted).

Petitioners in *New York* argued that the provision in the Low-Level Radioactive Waste Policy Amendments Act that "[e]ach State *shall* be responsible for providing * * * for the disposal of * * * low-level radioactive waste," 42 U.S.C. 2021c(a)(1)(A) (emphasis added), imposed a "direct command" that States "shall" adopt a program for low-level radioactive waste disposal. 505 U.S. at 169. However, because the Act also contained incentive provisions, the Court construed the statute as operating through those incentives rather than as a direct command to regulate. *Id.* at 169-170.

Consistent with *New York*, the court of appeals in this case correctly concluded that the CAA does not impose an independent mandate requiring States to adopt and submit to EPA approvable Title V permit programs, but rather works through the incentives in the Act to induce state cooperation. Pet. App. 25. "Virginia is not commanded to regulate; the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia." *Id.* at 29. Other courts of appeals have uniformly declined to interpret similar use of the term "shall" in the CAA as imposing a direct mandate, and petitioner cites no authority to the contrary.[14]

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[14] "Although the terms 'shall submit' could be construed to impose a mandatory duty upon the states to formulate a plan, judicial construc-

The court of appeals also correctly rejected petitioner's argument (Pet. 6, 20-21) that it will be subject to civil and criminal enforcement under Section 113 of the CAA, 42 U.S.C. 7413, if it fails to comply with the alleged direct mandate to adopt a permit program. See Pet. App. 25 n.6. With respect to Title V, Section 113(a)(2) establishes enforcement authority only to redress "violations of * * * an approved permit program," 42 U.S.C. 7413(a)(2), not authority to compel States to adopt a permit program. Furthermore, Sections 113(a)(3) and (b) authorize enforcement by EPA if certain CAA "requirements" and "prohibitions" are violated. For the same reasons that the CAA should not be interpreted to establish a direct mandate that States adopt approvable permit programs, state adoption of a permit program is not an enforceable "requirement" under Section 113.[15]

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tion of the Act has established that the Act merely gives the States the first opportunity to draft and submit a plan. A state may not be compelled to formulate or submit an implementation plan." *Sierra Club* v. *Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145, 1148 (7th Cir. 1983). See also, *e.g.*, *District of Columbia* v. *Train*, 521 F.2d 971, 983-985 (D.C. Cir. 1975), vacated and remanded for consideration of mootness *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam); *Plan for Arcadia, Inc.* v. *Anita Assocs.*, 379 F. Supp. 311, 314 (C.D. Cal. 1973) ("[T]here is no judicial remedy provided in the Act or elsewhere for the failure of the state to adopt and submit a plan."), aff'd, 501 F.2d 390 (9th Cir.), cert. denied, 419 U.S. 1034 (1974).

[15] Cf. *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975) (finding that the CAA does not provide EPA the authority to directly compel States to adopt certain CAA programs, and recognizing that Congress may use incentives to attain the same objective), vacated and remanded for consideration of mootness *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977) (per curiam); *District of Columbia* v. *Train*, *supra*; *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977) (per curiam).

3. Petitioner claims (Pet. 23-30) that Congress exceeded its Spending Power authority by increasing limitations on federal highway funds in nonattainment areas when a State fails to submit an approvable Title V permit program. This case does not present any novel question concerning Congress's Spending Power.

a. "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). This Court "has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy." *Ibid.*; see *New York*, 505 U.S. at 167, 171-173; *Massachusetts* v. *United States*, 435 U.S. 444, 461-462 (1978) (opinion of Brennan, J.); *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Oklahoma* v. *United States Civil Service Comm'n*, 330 U.S. 127, 143-144 (1947).

b. Petitioner asserts that the highway fund sanction passes "the point at which 'pressure turns into compulsion.'" Pet. 24, quoting *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). The court of appeals fully considered that issue in light of this Court's decisions and correctly concluded that "[t]he highway sanction here does not rise to the level of 'outright coercion.'" Pet. App. 27.

In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), this Court upheld a restriction on federal highway funding which South Dakota characterized as overly coercive. In so doing, the Court cited previous decisions such as *Fullilove* and *Lau*, in which the Court had upheld exercises of the Spending Power even though Congress had imposed a complete cut-off of substantial federal funding if Congress's requirements were not met. *Id.* at 206. The Court

also noted that previous cases had mentioned that some conditional federal expenditures "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" *id.* at 211 (quoting *Steward Machine*, 301 U.S. at 590). On the other hand, the Court also quoted Justice Cardozo's warning in *Steward Machine*, which noted the difficulty in equating an incentive to compulsion:

> [T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.

483 U.S. at 211 (quoting 301 U.S. at 589-590).

This case does not test the outer limits of the Spending Power. As the court of appeals recognized, the highway funds sanction does not cut off all federal highway funding, or even require that a State lose any federal highway funds. Pet. App. 27. Rather, Congress provided that, even if a State fails to submit an approvable Title V permit program, federal highway funds may still be used for projects not located in nonattainment areas, and those funds may still be used even in nonattainment areas for safety projects, mass transit, and other projects that will improve air quality and not encourage single occupancy vehicle use. Not only has this Court upheld more significant restrictions in such cases as *Fullilove* and *Lau*, but the courts of appeals have also upheld conditions that exert substantially greater pressure upon States.[16]

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[16] *E.g.*, *Nevada* v. *Skinner*, 884 F.2d 445, 446 (9th Cir. 1989) (withdrawal of virtually all federal highway funds), cert. denied, 493 U.S. 1070 (1990); *City of Columbia* v. *Costle*, 710 F.2d 1009, 1013 n.3 (4th Cir. 1983) (loss of construction grants for sewage treatment plants); *Middlesex County Utilties Auth.* v. *Borough of Sayreville*, 690 F.2d 358 (3d Cir. 1982) (same), cert. denied, 460 U.S. 1023 (1983);

c. The condition that Congress has imposed, adoption of an approvable Title V permit program, also meets this Court's requirement that the condition "bear *some relationship* to the purpose of the federal spending." *New York*, 505 U.S. at 167 (emphasis added); see *id.* at 172 (upholding specific funding condition that was found to be "reasonably related to the purposes of the expenditure"); see also *Missouri* v. *United States*, 918 F. Supp. 1320, 1332-1335 & nn.14-16 (E.D. Mo. 1996) (rejecting constitutional attack on the highway funds sanction as applied to CAA Title I programs), appeal pending, No. 96-2244 (8th Cir.).

Through the highway funds sanction, Congress ensured that, if States fail to implement an approved Title V permit program to help control emissions in their most polluted areas, federal funding for transportation projects in those areas will be restricted to projects that will be consistent with improving air quality.[17] As the court of appeals observed in this case, Congress surely possesses authority

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Oklahoma v. *Schweiker*, 655 F.2d 401 (D.C. Cir. 1981) (withdrawal of medicaid funds); *Walker Field, Colorado, Pub. Airport Auth.* v. *Adams*, 606 F.2d 290, 297 (10th Cir. 1979) (withdrawal of grants for airport construction); *Nebraska* v. *Tiemann*, 510 F.2d 446, 448 (8th Cir. 1975) (withdrawal of an entire category of federal highway funds).

[17] The Third Circuit has also noted the connection between highway construction and the deterioration of air quality. See *Delaware Valley Citizens' Council for Clean Air* v. *Pennsylvania*, 678 F.2d 470, 478 ("Congress has itself suggested the relationship between a failure to implement programs required by the Clean Air Act and a cut-off of Title 23 funds [as provided] in 42 U.S.C. § 7506(a). Such a cut-off serves both to induce implementation of the [vehicle inspection and maintenance] program and to inhibit highway building, which itself contributes to the problems which the Clean Air Act is designed to remedy."), cert. denied, 459 U.S. 969 (1982); *Pennsylvania* v. *EPA*, 500 F.2d 246, 261 (1974) ("The states have, by their transportation policies, contributed to the problem of air pollution from automobile emissions, and they can be required to take affirmative actions to correct it.").

under the Spending Clause to "ensure that funds it allocates are not used to exacerbate the overall problem of air pollution."[18] Pet. App. 28; see also *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project *and to the over-all objectives thereof*.") (emphasis added).

Petitioner claims (Pet. 28) that the court of appeals gave insufficient weight to the fact that a Title V permit program regulates stationary sources of air pollution (primarily industrial point sources), while the highway funds sanction aims to reduce pollution from mobile sources (*i.e.*, motor vehicles).[19] However, as the court of appeals recog-

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[18] See, *e.g.*, *South Dakota*, 483 U.S. at 208-209 & n.3 (upholding requirement that States establish 21 as the minimum drinking age in order to receive their full allocation of federal highway funds); *Fullilove*, 448 U.S. at 474-475, 478-480 (opinion of Burger, C.J.) (upholding minority set-asides requirements as a condition on federal public works grants); *Lau*, 414 U.S. at 566-569 (upholding conditions imposed under the Civil Rights Act of 1964 on States that accept federal education funds); *Oklahoma* v. *United States Civil Service Comm'n*, 330 U.S. at 143-144 (upholding Hatch Act requirement that States restrict the political activities of state officials who oversee expenditures of federal grants). See also *Oklahoma* v. *Schweiker*, 655 F.2d at 406-407 (restrictions on federal grants have never been subject to a "rigid nexus" test requiring that those conditions be "precisely related to the purpose of the federal funds whose receipt is conditioned") (discussing cases).

[19] Petitioner also asserts (Pet. 29) that the highway funds sanction is irrational because federal highway funds can be used only for projects that have been shown to be in conformity with an applicable SIP, as required by 42 U.S.C. 7506(c). The court of appeals did not discuss that argument because petitioner failed to present it below. In any event, petitioner is mistaken regarding the effect of a conformity determination.

The CAA conformity provision requires that all federally supported transportation projects be part of a transportation plan and transporta-

nized, "[t]he CAA as a whole is a comprehensive scheme to cope with the problem of air pollution from all sources." Pet. App. 28. Mobile sources and stationary sources both contribute significantly to the overall air pollution problem; in fact, both produce many of the same regulated air pollutants.[20]

4. Petitioner argues (Pet. 19-22) that the economic impact of the highway funds sanction, a conditional exercise of the Spending Power, in combination with the economic impact of the offset sanction, a conditional exercise of the Commerce Power, results in a violation of the Tenth Amendment. That argument is mistaken.

a. Under *New York*, the Tenth Amendment is not violated merely because Congress uses several entirely constitutional sources of authority to induce States to act, even if the combination of the various sources of authority

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tion improvement program which are in conformity with the applicable SIP. 42 U.S.C. 7506(c); see generally *Environmental Defense Fund, Inc.* v. *EPA*, 82 F.3d 451, amended, 92 F.3d 1209 (D.C. Cir. 1996). The approval of a project under the conformity process is not, however, a blanket environmental endorsement of a project, but simply a deterination that, under the particular set of conditions assumed in the control strategy, the project may proceed with federal funding. The success of any control strategy necessarily depends not just upon the conformity status of particular transportation projects but upon the State's adoption and implementation of *all* the measures needed to adequately control emissions of the relevant pollutants, including an effective Title V permit program.

[20] With respect to ozone, for example, "[t]he two major sources of the ozone precursors * * * are motor vehicles and industry." H.R. Rep. No. 490, 101st Cong., 2d Sess. 202 (1990). Similarly, "[p]articulate matter originates from stationary and mobile sources, both natural and man-made." *Natural Resources Defense Council, Inc.* v. *EPA*, 902 F.2d 962, 965 (1990), vacated in part on other grounds, 921 F.2d 326 (D.C. Cir. 1991), cert. dismissed, 498 U.S. 1075, cert. denied, 498 U.S. 1082 (1991).

would have an economic impact on the State. 505 U.S. at 171-174. Rather, the Tenth Amendment issue turns on whether Congress has "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161, 188 (quoting *Hodel*, 452 U.S. at 288).[21]

Petitioner's argument is also inconsistent with *Hodel*, in which the Court concluded that the economic impact of a federal regulatory program on Virginia's economy is insufficient to establish a violation of the Tenth Amendment. 452 U.S. at 292 n.33. Rather, the controlling factor is "the nature of the federal action, not the ultimate economic impact on the States." *Ibid.* See also *FERC* v. *Mississippi*, 456 U.S. 742, 766 (1982) (Congress does not exceed its authority because the choice it presents to a State "may be a difficult one").

The economic impact of the offset sanction is likewise unrelated to the inquiry in *Dole* regarding whether an exercise of Congress's Spending Power would "pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (citation omitted). In contrast to the highway funds sanction, the offset sanction directly regulates private parties under the Commerce Clause. As explained in *New York*, under such direct regulation

> [t]he affected States are not compelled by Congress to regulate, because any burden caused by a State's

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[21] In *New York*, the Court noted that the two constitutional incentives--a funding incentive parallel to the highway funding incentive in this case, see 505 U.S. at 171-172, and the imposition of substantive federal regulations parallel to the CAA offset sanction, see *id.* at 173-174—applied "considerable internal pressure" to States and "coax[ed]" the States into regulating in the manner Congress desired. *Id.* at 187. The Court nonetheless found no constitutional flaw in the two sets of incentives invoked by Congress or in their combined effect. *Id.* at 171-174.

> refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign.

505 U.S. at 174. Accordingly, the court of appeals correctly concluded that "[t]he burden of the offset sanction falls on private parties. * * * [I]t does not burden Virginia as a *governmental* unit." Pet. App. 28. Therefore, the simultaneous application of the offset sanction and highway funds sanction would not result in a constitutional violation.

b. Petitioner argues (Pet. 21-22) that the highway funds and offset sanctions are unnecessary once EPA promulgates a federal Title V program for Virginia, and that the fact that those sanctions would nonetheless remain in effect establishes that the scheme is unduly coercive in violation of the Tenth Amendment.

Petitioner's argument is mistaken. The federal sanctions at issue here leave petitioner with the option of refusing to enact a scheme that complies with Title V's requirements. They therefore do not implicate *New York*'s anti-commandeering principle, regardless of whether they are considered singly or together. See Pet. App. 29-30. Moreover, the need for incentives for state cooperation continues well after promulgation of a federal Title V program. As the court of appeals recognized (Pet. App. 5 (quoting applicable legislative history)), Congress believed that the nationwide CAA program works best, and the goals of the CAA are best achieved, when EPA serves in an oversight role and the States, with their greater familiarity with local problems and conditions, adopt and implement the various programs. Thus, as long as a State chooses not to adopt an approvable Title V permit program, the rationale for the sanctions—to encourage state

cooperation and therefore to ensure the effectiveness of the CAA program—remains.[22]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[22] In addition, the court of appeals recognized that the sanctions reduce air pollution by requiring greater offsets for certain stationary sources and reducing emissions from mobile pollution sources. Pet. App. 28. Because the sanctions affect only areas within the State that are out of attainment with the NAAQS, they continue to serve the statutory purpose of achieving attainment even after adoption of a federal Title V permit program.

No. 96-567

(4)

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1996

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

and

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, ET AL.,
Intervenors.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI BY INTERVENORS ENVIRONMENTAL DEFENSE FUND, INC., KATHLEEN F. DERRICOTT, CLIFTON E. DERRICOTT, ANDRE L. BROWN, CALEATA JOHNSON AND GWEN HEDGEPETH

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QUESTION PRESENTED

Because of their particular interest in securing access to the courts to review decisions to issue permits under the Clean Air Act, Intervenors Environmental Defense Fund, Inc., Kathleen F. Derricott, Clifton E. Derricott, Andre L. Brown, Caleata Johnson, and Gwen Hedgepeth limit their Brief in Opposition to the first of the three questions presented in the Commonwealth of Virginia's Petition for Certiorari. These Intervenors suggest that the question is more appropriately framed as follows:

> Whether the Environmental Protection Agency lawfully refused to authorize the Commonwealth of Virginia's administration of the federal Clean Air Act permit program because Virginia would impose upon the program only narrow, restrictive opportunities for state court review of state agency permit decisions in direct contradiction to the Act's requirements of expansive citizen participation in and judicial review of, permit decisions.

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI BY INTERVENORS ENVIRONMENTAL DEFENSE FUND, INC.[1], KATHLEEN F. DERRICOTT, CLIFTON E. DERRICOTT, ANDRE L. BROWN, CALEATA JOHNSON, AND GWEN HEDGEPETH

STATEMENT OF THE CASE

The Commonwealth of Virginia ("Commonwealth") has filed a petition for certiorari asking this Court to review the decision of the Court of Appeals for the Fourth Circuit holding that the Environmental Protection Agency ("EPA") properly did not act arbitrarily, capriciously or unlawfully in refusing to delegate administration of the Clean Air Act air permit program. Commonwealth v. Browner, 80 F.3d 879 (4th Cir. 1996). This Brief in Opposition is submitted by Intervenors, Environmental Defense Fund, Inc. and Kathleen f. Derricott, Clifton E. Derricott, Andre L. Brown, Caleata Johnson and Gwen Hedgepeth ("EDF Intervenors"). Intervenors, a national nonprofit environmental organization with thousands of Virginia members, and five individual black citizens of Virginia, have all experienced first hand the harsh consequences of Virginia's barriers to state court review of environmental permitting, which serve to suppress citizen involvement and grant special privilege to permit applicants. Intervenors thus oppose the Commonwealth's efforts to subvert the express actions of Congress to expand and encourage citizen participation and afford expansive judicial

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[1] The Environmental Defense Fund, Inc., is a not-for-profit environmental membership organization. Pursuant to Supreme Court rule 29.6, there are no other parent companies or wholly owned companies.

review in the process of issuing air emission permits, by seeking to extend its own harsh barriers to judicial review to the administration of the federal Clean Air Act.

Because the primary interests of EDF Intervenors are in securing meaningful and appropriate citizen participation in, and judicial review of, Clean Air Act air permit decisions in Virginia, EDF Intervenors address only the first question presented in Virginia's petition for certiorari — that regarding the failure of Virginia to satisfy the judicial review requirements set forth in §502(b)(6) of the Act, 42 U.S.C. §7661a(b)(6). EDF Intervenors support the position of the EPA and the remaining Intervenors with regard to the second and third questions presented, but do not address those issues here.

The decision of the Fourth Circuit affirmed EPA's determination not to delegate Clean Air Act program administration to the Commonwealth, in part, because Virginia law does not allow for judicial review of decisions that would be made by state agencies in granting or denying air emission permits under the Act to the extent required if delegation is to be made. The Court of Appeals held that the Act required expansive public participation and judicial review, that the extraordinarily-restrictive limits on judicial review in the Commonwealth do not comport with those requirements, and that the EPA's limiting interpretation of the scope of the Act's judicial review provisions to conform to the minimum requisites of Article III of the Constitution was reasonable and appropriate. The Court of Appeals also rejected the Commonwealth's argument that the Act's judicial review provisions should, in effect, be read out of the Act or,

stated differently, that those provisions should be interpreted to permit a state to impose its own sharply restrictive opportunities for judicial review on administration of the federal program.

The Commonwealth sought and was denied rehearing en banc of the panel decision. It is significant that the Commonwealth did not seek rehearing of the panel decision on the issue of the judicial review provisions in seeking en banc rehearing.

In its Petition, under the guise of an asserted intrusion upon its state sovereignty, the Commonwealth demands the award of federal dollars to administer the Clean Air Act permit program despite its refusal to conform to Congressional mandates imposed as a prerequisite to federal program delegation. The first question presented by Petitioners asks this Court to impose the state's restrictive concept of judicial review upon a federal program delegation that is contrary to the minimum standards set by Congress.

The Commonwealth has imposed the most severe limitations upon judicial review of environmental agency decisions of any state. Under a long line of Virginia Supreme Court decisions interpreting the environmental and administrative laws of the Commonwealth, the state's highest court and its lower appellate courts have repeatedly concluded that Virginia law effectively bars judicial review of state agency air and water permit decisions to all but the permit

applicant.[2] Modification to the judicial review provisions of its Air Pollution statute in 1995 largely codified this existing precedent and essentially retained the restrictions on judicial review applicable to air permit decisions.[3]

Thus, under Virginia law, citizens are denied standing to seek judicial review of any air permit decision even though they may live or own property downwind or downstream of the permitted facility, even if they have riparian rights or live next door.[4] Under these limits on judicial review, the use of

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[2] Prior to 1995, the Commonwealth's air and water statutes flatly prohibited judicial review by anyone but the "owner", e.g., the permit applicant. Environmental Defense Fund v. Virginia State Water Control Board, 12 Va. App. 456, 404 S.E.2d 728 (1991); Town of Fries v. State Water Control Board, 13 Va. App. 213, 409 S.E.2d 634 (1991); Citizens for Clean Air v. Commonwealth of Virginia, 13 Va. App. 430, 412 S.E.2d 715 (1991).

[3] The modified statutes purport to allow standing to participants in the public process related to an agency's decision, but only if the party can demonstrate that (1) such person has suffered an actual, threatened or imminent injury; (ii) such injury is an invasion of an *immediate, legally protected, pecuniary and substantial interest* which is concrete and particularized; (iii) such injury is fairly traceable to the decision of the Board and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision by the court." (Emphasis added). Va. Code §10.1-1318. The codification of the established requisites of "immediate" and "pecuniary and substantial" essentially continues the bar to anyone but the permit applicant from seeking judicial review. See, Harbor Cruises, Inc. v. State Corporation comm'n, 219 Va. 675, 250 S.E.2d 347 (1979)(immediate, pecuniary and substantial interest required).

[4] Environmental Defense Fund v. Virginia State Water Control Board,

(continued...)

the environmental air resource is immaterial, as is the potential threat to health or welfare. For the same reasons -- lack of standing -- citizens also may not intervene in state enforcement actions for permit violations. Indeed, even the denial of a request for either an informal or formal administrative hearing is not appealable.[5] Finally, only promulgated regulations may be reviewed, while an agency's use of unpromulgated rules may be only appealed by a permit applicant.[6]

Intervenors in this action include five individual African American citizens. As members of a minority population, they are particularly affected by barriers against judicial review of agency decisions. A number of governmental and private studies have documented the disproportionate placement of heavily polluting facilities in areas which members of disadvantaged racial groups predominantly reside, even when compared to communities

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(...continued)
(downstream landowners, riparian users, fishermen); Town of Fries v. State Water Control Board, (adjacent permit holder, downstream municipal water supply intake); Citizens for Clean Air v. Commonwealth of Virginia, (downwind property owners). Cases cited supra, note 2. See Commonwealth v. Browner, 80 F.3d 869, 879 (4th Cir. 1996) (Commonwealth Petition, App. 21-22.)

[5] Environmental Defense Fund v. State Water Control Board, 12 Va. App. 456, 404 S.E.2d 728 (1991) (no review of denial of formal hearing request); Environmental Defense Fund v. State Water Control Board, Chan. No. HB-241-3 (City of Richmond, 1992) (no review of denial of informal hearing).

[6] Board of Medicine v. Virginia Physical Therapy Ass'n, 13 Va. App. 458, 413 S.E.2d 59 (1991), aff'd 245 Va. 125, 427 S.E.2d 183 (1993).

similar in all respects but race.[7] The reasons for such disproportionate placements are clear. First, the minority residents of these areas lack the voting power to undo by legislation Virginia's restrictions on their right to challenge the State's decisions issuing permits for polluting facilities in their areas. Second, the denial of access to the courts for all but the permit applicant or holder limits to those with political or economic influence the ability to affect state or agency decisions through extra-judicial efforts. Third, the exclusive availability of judicial review to the permit applicant skews the decision-making process to the extent that only decisions adverse to permit holder are subject to judicial review and correction.[8] The result is a system in which the lives, health,

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[7] This issue was first addressed in a study prepared by the U.S. Government Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983) ([b]lacks make up the majority of the population in three of the four communities where the landfills are located). That study was followed by a far larger study by the United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the United States* (1987) (although socio-economic status appears to play an important role in siting of hazardous waste facilities, race still proves to be a more significant factor). An EPA report concluded that racial minority and low-income populations experience higher than average exposure to air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides, *Environmental Equity, Reducing Risk for all Communities*, EPA A230-R-92-008 (June 1992).

[8] "Without the possibility of judicial review by citizens, public participation before a State administrative agency could become a paper exercise. State officials will inevitably spend less time considering and responding to comments of parties who have no standing to sue, but will

(continued...)

homes and property of minority citizens may be imperiled by the state agency actions without even the opportunity to question the legality and propriety of such actions before a court.

Increasingly, members of racial minorities perceive that environmentally risky and unwanted land uses involving pollution and toxic materials are disproportionately located next to them. Although this question is being debated throughout the nation, there is strong evidence that, in Virginia, it is reality. See, e.g., Residents Interested in Saving the Environment v. Kay, 768 F. Supp. 1144, 1149 (E.D. Va. 1991) aff'd, 768 F.2d 573 ("The placement of landfills in King and Queen County from 1969 to present has had a disproportionate impact on black residents."); Joint Legislative Audit and Review Commission of the Virginia General Assembly, Solid Waste Facility Management in Virginia: Impact on Minority Communities (1995) ("solid waste facilities in minority communities received fewer inspections and had especially long periods of non-compliance compared to those facilities in white communities").

States clearly have the ability to limit judicial review of matters solely within the province of a state, so long as those limits do not transgress Fourteenth Amendment

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[8] (...continued)
be more attentive to the comments of parties who can challenge the administrative decision in court." EPA, "Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act", Final Rule, 61 Fed. Reg. 20972 (1996) (Codified at 40 C.F.R. § 123.30).

guarantees. Here, however, Virginia seeks instead to impose its peculiarly restrictive limits on the availability of judicial review upon the administration of a federal program designed to control air pollution nationwide. Thus, this case does not raise concerns of state sovereignty. Rather, the case concerns only the authority of Congress to impose conditions upon delegation to a state of the administration of a federal program to protect the nation's air quality. Here, as with a host of other federal environmental programs, the state is not obligated to undertake program delegation. The Commonwealth may forego the incentives offered by Congress and do nothing, in which event EPA will operate the program in accord with Congressional instructions. Here, as a part of a national program, Congress simply required a consistent minimum standard of judicial review for permit decisions to be made under the Act and EPA has applied that requirement. Thus, it cannot fairly be argued that either Congress or EPA has exceeded the limits of federal power or intruded on state sovereignty.

REASONS FOR DENYING THE WRIT

The Commonwealth of Virginia Has Provided No Basis Recognized By This Court, To Warrant Review Of The Decision Of The Fourth Circuit With Respect To The Judicial Review Provisions Of The Clean Air Act.

The Commonwealth asserts in its Petition that review of the decision below is warranted because it presents an important federal question that should be decided by this Court, a conflict with relevant decisions of this Court, and a

conflict with decisions of other federal Courts of Appeals. However, the Commonwealth is unable to support any of those assertions. With respect to the Court of Appeals' determinations regarding judicial review provisions of the Act. To the contrary, as discussed within, Petitioner can formulate no alternate to the Court of Appeals' interpretation of those provisions that would merit review by this Court. Neither can Petition demonstrate any conflict between the Court of Appeals' decision and relevant decisions of this Court or other federal Courts of Appeals. Accordingly, the writ should be denied.

A. The Commonwealth Has Offered No Reasonable Alternative Interpretation Of The Judicial Review Requirements of §502(b)(6) Of The Clean Air Act That Merits Review By This Court

Section 502(b)(6) of the Clean Air Act, 42 U.S.C. § 7661a(b), provides that, in order to receive federal program delegation, a state program must provide the opportunity for judicial review to three categories of persons. Specifically, §502(b)(6) states that a state program must provide:

> Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of

> permit actions, including applications, renewals, or revisions, and including *an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law* (emphasis added).

EPA incorporated this statutory language verbatim into the Clean Air Act program requirements according to which it assessed Virginia's compliance. 40 C.F.R. § 70.4(b)(3)(x).

The language of the Act plainly requires expansive opportunities for judicial review of permit actions as a condition of program delegation to a state. The legislative history is equally clear that this section was intended to preserve and expand the availability of judicial review, not restrict it. These provisions were deemed essential to the fair treatment of all parties in the permit issuance process, as indicated by the Statement of the Senate Managers of the Act:

> Several other provisions [in section 502(b)(6)] are included to ensure fair treatment in the permit process. For example, we make clear that judicial review of final actions by the permitting authority to issue or deny permits shall be available in State court to anyone who could obtain such review under any applicable law. *This provision ensures that existing provisions of law governing the availability of review of final actions on permit applications*

are in no way limited, and that interested parties who arguably are affected by permit decisions are guaranteed their day in court.

Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean Air Act Amendments of 1990, reprinted in 136 Cong. Rec. 516, 941 (daily ed. October 27, 1990) (emphasis added).

It is likewise clear that the public participation and judicial review requirements serve important roles in the functioning of delegated programs. They serve to ensure that the federal-state partnership inherent in delegated federal programs is implemented in a manner which not only incorporates federal and state resources, but the resources of citizens as well in fighting the common pollution enemy. The critical importance of active and meaningful citizen participation in successfully implementing environmental programs cannot be overemphasized, and are particularly relevant in delegated programs where federal oversight is necessarily relaxed.[9] Moreover, the opportunity for judicial

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[9] In describing the respective delegation roles of the federal-state partnership and citizens under the Clean Water Act permit program, analogous to the Clean Air Act permit program now before the Court, EPA stated: "EPA [has a] strong policy interest in deferring to State administration of authorized NPDES [permit] programs. EPA firmly believes that States should implement the NPDES program in lieu of the federal government. However, EPA just as firmly believes that the opportunity for citizen participation is a vital component of a State NPDES program. In authorizing State programs to act in lieu of the federal government, EPA must ensure that the implementation of the State program will be substantially adequate and procedurally fair. Because this

(continued...)

review is an essential element even to effective public participation at the administrative level, as EPA recognized in promulgating parallel rules requiring the availability of state judicial review for delegated federal programs under the Clean Water Act, 33 U.S.C. § 1251:

> When citizens are denied the opportunity to challenge executive decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a state is not addressing their concerns about permits because the citizens have no recourse to an impartial judiciary, that perception also has a chilling effect on all the remaining forms of public participation in the permitting process.

Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 60 Fed. Reg. 14588, 14589 (March 17, 1995) (notice of proposed rule

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[9] (...continued)
rule will provide additional assurance of State program adequacy and fairness, it will allow EPA to exercise less oversight of State programs and allow more State autonomy in implementing NPDES [permit] programs." Id., 61 Fed. Reg. at 20974.

making[10]). (Cited by the lower court with approval in Commonwealth of Virginia v. Browner, 80 F.3d 869, 880 (4th Cir. 1996). (App. 21-22).

Given the express statutory language, clear intent of Congress, and important role of judicial review in the functioning of the delegated program, the only issue as to which an interpretation of the judicial review provisions is required, if at all, is with respect to the phrase affording judicial review to "any person who participated in the public comment process." The Court of Appeals, as well as both EPA and the Commonwealth, all agreed that this phrase requires a limiting interpretation. This is necessary because the phrase does not contain language which expressly limits its application to participants in the public comment process who meet the requisites of Article III standing or, as the Commonwealth argues, without such an interpretation limiting its reach to Article III requirements "the provision requires states to affort standing, regardless of injury to any person who participated in the public comment process". Pet. at 12.

It has long been recognized that although Congress has no power to alter the basic Article III standing requirements, it does have the power to waive prudential obstacles to standing:

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[10] The EPA amendments were finalized on June 7, 1996, and are codified at 40 C.F.R. § 123.30.

> Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

Warth v. Seldin, 422 U.S. 490, 501 (1975) (citations omitted).

In enacting Section 502(b)(6), 42 U.S.C.§ 7661a(b)(6), Congress chose to exercise that right by expanding the rights to judicial review of air permits. The legislative history indicates that Congress felt strongly about the availability of judicial review, and clearly meant to remove every *prudential* barrier within their authority in order to encourage citizen participation. At the same time, Congress is under no requirement specifically to restate in every statute the requiremenst of Article III and every statute is to be interpreted, if at all possible, in a manner that conforms to the Constitution. New York v. United States, 505 U.S. 144, 170 (1992) (citations omitted). This canon of judicial construction ensures that every act of Congress shall be contained within its constitutional bounds.

Recognizing the plain language of the Act itself, combined with the long-standing ability of Congress to grant any right of action subject to the Constitutional requirements of Article III, EPA correctly interpreted the provisions of section 502(b)(6) to establish a "minimum floor" as limited by the requirements of Article III of the U.S. Constitution.

The Fourth Circuit upheld EPA's interpretation under the general rule established in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Commonwealth of Virginia, 80 F.3d at 878 (App. 17-18) at 878. Finding EPA's interpretation in harmony with the statute, and resolving the "slight tension" within section 502(b)(6), the Fourth Circuit ruled that EPA's interpretation was a "permissible construction of the statute" and entitled to deference. Id.

Intervenors assert that the language is plain on its face, and if any interpretation is required by EPA, it is negligible. Further, the interpretation given by EPA is so fundamental that it is no interpretation at all, but rather a reiteration of the basic constitutional holding of this Court in Warth v. Seldin, 422 U.S. at 501. Similarly, the "deference" granted to EPA by the lower court was minimal, and the statute's words and Congressional intent were easily discernible without any deference to EPA.

The Commonwealth's Petition fails even to identify a reasonable, alternative to this interpretation of §502(b)(6) that it suggests merits this Court's attention. Although this failure is disguised by the profuse assertions regarding state sovereignty, it warrants denial of the writ.

Although it poses no such interpretation to this Court, the Commonwealth suggested an interpretation in the court below, which the Court of Appeals carefully considered and properly rejected. Specifically, the Commonwealth suggested that that language of §502(b)(6) granting judicial review to those in the second category of §502(b)(6) "any person who participated in the public comment process" — should be limited by the language of the third category — "any other person who could obtain judicial review. . .under applicable law." Commonwealth v. Browner, 80 F.3d at 877 (App. 15). The Court of Appeals properly rejected that argument holding that "Virginia's proposed reading is contrary to ordinary principles of statutory construction and to the rules of English usage," Id. and one that would render the first to categories of persons granted review "mere surplusage." Id. (Citations omitted).

Thus, in contrast to the limiting interpretation of EPA held appropriate by the Court of Appeals, which the Court found "harmonizes" the several portions of the Act and conforms it to Article III requisites, the only interpretation the Commonwealth has offered is one that would render the section meaningless by eliminating any minimum floor for judicial review and supplanting it, instead, with whatever judicial review provisions any state wished to impose — however restrictive.

In short, in the face of express statutory language, clear expressions of congressional intent, the important purposes served in the functions of delegated programs each of which mandates expansive judicial review of permit decisions, and a reasonable, harmonizing interpretation

which, at the same time, recognizes the authority of Congress to remove prudential barriers to standing and the requisites of Article III, to the extent that the Commonwealth offers any alternative interpretation it is a tortured one that would require in the administration of a federal program application of each state's peculiar limits on judicial review, even to the extent of limiting that opportunity to the permit applicant alone. The Commonwealth has carefully avoided presenting such a proposed interpretation to this Court in its Petition, and such an interpretation does not merit consideration by this Court.

B. This Case Presents No Conflict Between The Established Law Of This Court That Would Merit Review

With respect to the first question presented, the Commonwealth relies exclusively upon a purported conflict between the decision below and this Court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), as a basis for granting the writ. Pet. 10-16. No such conflict exists. The Court of Appeals carefully considered the language of Gregory as applied to this case. A brief review demonstrates that no conflict exists.

Gregory has no application until a federal program impinges on some aspect of state sovereignty. Gregory, 501 U.S. at 467 (federal law not applicable to state judges unless Congress has made it clear that state judges are included). In Gregory, the question was whether federal law imposed a direct, involuntary mandate on state judges. Here, the entire

applicability of the program, whatever, its interpretation, is voluntary. There is no impingement on state sovereignty in the Clean Air Act delegation provisions unless the state *elects to accept delegation*. While the Commonwealth criticizes the Fourth Circuit for stating that section 506(b)(6) unambiguously applies to state courts (Petition at 14), the Commonwealth ignores the voluntary nature of Clean Air Act program delegation. For the same reason, the "plain statement rule" applied in cases such as Gregory does not apply where Congress has provided a choice for states. As the Supreme Court stated in Gregory, the requirement that Congress clearly state its intent to preempt traditional state sovereign powers "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory, 501 at 461. It is a rule of interpretation designed to avoid a constitutional conflict. Here, however, there is no such conflict.

Furthermore, for Gregory to even come into play in the interpretation of this statute, the statute must be, as a threshold matter, ambiguous as to whether Congress intended to impinge upon a core state function. As the Fourth Circuit Opinion correctly notes, there is no such ambiguity present in this statute. Commonwealth v. Browner, 80 F.3d at 879. (App 20). It is clear that the statute requires a delegated state program to show availability of state court judicial review for air emission permits. There is no ambiguity on that point and, thus, Gregory's admonition to avoid interpretations that raise constitutional questions is inapplicable.

No one doubts the principle that control of the state judiciary is a core state function. Such core functions, however, are not impacted by any federal law until that federal law directly impinges upon the state. It was clearly established by this Court in Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 269 (1981), that even though the federal law may have major impacts on state natural resource regulation or use, such impacts do not raise constitutional questions where Congress operates within its authority and offers the state the option to administer the program or leave its application to the federal government. Here, the Commonwealth is free to choose whether it wishes to accept delegation of the Clean Air Act permit program, and with it embrace the notions of fairness and citizen participation, including judicial review, that the Congress has chosen to impose on programs the states elect to operate. Whatever application Gregory v. Ashcroft may have to state sovereignty situations, it is not applicable here.

What the Commonwealth really fears is that its long-standing restrictions barring citizen access to the courts will be undercut where, should it fail to accept delegation, the issuance of air emission permits will be done by EPA, in a forum where citizen participation is welcomed, and the full protection of the courts is granted to those who are injured within the bounds of the U.S. Constitution. As a sovereign power, the Commonwealth is free to take offense at such notions, but it is not unconstitutional for the Congress to think otherwise.

Whatever the Commonwealth's motives may be, it's Petition before this Court presents no conflict with Gregory

or any other case. In fact, the Commonwealth would have this Court chart a new course for its long-standing application of the judicial review standard enunciated in Gregory, converting a rule of interpretation into a process that would bring every facial federal relationship with state government into a constitutional confrontation. The Petition fails to state any substantive grounds for the Court to so dramatically change its application of the interpretative rule in Gregory. Rather, the Commonwealth's Petition is an invitation for this Court to consider Virginia's own views about citizen standing. The proper forum for that political argument is the U.S. Congress, not this Court, and the Petition should be denied.

C. The Decision Of The Court Of Appeals Below Is Not In Conflict With Decisions Of Any Other Courts of Appeals

There is no conflict among the Courts of Appeals regarding the judicial review provisions of the Clean Air Act.

Petitioners indicate that each question presented satisfies this Court's several standards as to the grant of a writ of certiorari, including that the decision below conflicts with those of other federal courts of appeal. Pet. at 9. However, the Commonwealth does not cite or refer to a single decision of a court of appeal that in any way conflicts with the decision of the Fourth Circuit at issue on the issue of the judicial review provisions of the Clean Air Act. See Pet. 10-16.

In fact, there are no decisions of the Courts of Appeal that conflict with the decision below. This condition is undoubtedly traceable to the Commonwealth's uniquely extreme restrictions on those who have standing to seek judicial review of state agency decisions on air permits, discussed above. Nevertheless, the Commonwealth cannot establish a conflict among federal circuit courts on this issue that would warrant review of this Court.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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No. 96-567

(5)

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In The

Supreme Court of the United States

October Term, 1996

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

and

AMERICAN LUNG ASSOCIATION OF NORTHERN VIRGINIA, ET AL.,

Intervenors.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF OF THE PETITIONER

The Commonwealth of Virginia ("Commonwealth") hereby files this reply brief in response to Respondents' Brief in Opposition ("EPA Br.") and the briefs filed by the Intervenors.

I.

EPA'S BRIEF DEMONSTRATES THAT § 502(b)(6) OF THE CAA IS AMBIGUOUS AND THAT CONGRESS HAS NOT INDICATED IN PLAIN TERMS A DESIRE TO REPLACE STATE STANDING LAWS IN THE MANNER EPA CLAIMS

If this Court harbors any doubts that the Commonwealth has correctly characterized § 502(b)(6) of the federal Clean Air Act ("CAA") as ambiguous, EPA's Brief should lay such concerns to rest. EPA's conflicting positions on this issue are interspersed throughout its Brief. On page 15, in an effort to fend off any application of the "plain statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), EPA claims that § 502(b)(6) already contains a "plain statement" which automatically renders the Commonwealth's standing laws inadequate for Title V program approval.

If that assertion were correct, no interpretation of the statute by EPA would have been needed. But elsewhere in its Brief, EPA concedes – as it must – that § 502(b)(6) "could be read to require States to dispense with standing requirements altogether." EPA Br. at 7. EPA then points out that it interpreted the statute by administratively adopting Article III standing requirements and then measured state programs, including the Commonwealth's, against its standard and not by any "plain statement" set out by Congress.

Such inconsistent arguments readily expose the ambiguity inherent in the statute, as well as the extraordinary efforts of EPA to support the Court of Appeals' unwillingness to apply *Gregory* as this Court intended. A

correct application of that decision would have required EPA to adopt an interpretation of the statute which would not intrude into a core element of state sovereignty – in this case, the jurisdiction of Virginia courts and the Commonwealth's right to decide for itself whether and to what extent to waive its immunity from suit in its own courts.[1]

II.

EPA MISCONSTRUES VIRGINIA'S CONSTRUCTION OF § 502(b)(6)

EPA could have avoided a constitutional confrontation by accepting the Commonwealth's reasonable construction of § 502(b)(6) (Petition, App. at 77).[2] That construction gives meaning to all three elements of the judicial review provision of § 502(b)(6), recognizing that each focuses on a different type of person: the applicant, a participant in the comment process, and a nonparticipant. EPA misunderstands this important distinction (EPA Br. at 8-9, 15 n.11), as did the Court of Appeals.[3]

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[1] Judge Luttig of the Court of Appeals, one of the five judges who voted to grant rehearing of this case (Petition, App. at 34), has articulated the appropriate application of the "plain meaning" rule in his dissent in *Virginia Dep't of Educ. v. Riley*, 86 F.3d 1337, 1353 (4th Cir.), *reh'g granted* (Oct. 11, 1996).

[2] EPA claims that its interpretation "accommodates" concerns of state sovereignty by permitting States to deny judicial review to participants not meeting (EPA's) Article III standard. EPA Br. at 17. Yet even EPA's interpretation intrudes into state sovereignty. Thus, EPA ignores the question whether Congress intended to do so.

[3] Contrary to EPA's claim, Virginia has never read the words "under applicable law" in the third phrase of § 502(b)(6) to modify the first two phrases, which would be grammatically incorrect. All parties must agree, however, that the entire § 502(b)(6) concerns only laws that are applicable in the States, which can only mean state standing laws.

The legislative history of § 502(b)(6) shows that Congress constructed the statute as it did because it wanted to ensure that Title V did not unintentionally eliminate existing avenues of judicial review. Its intent was not to establish three mutually exclusive categories of persons with different standing rights.[4] Initially, the House Amendment to § 502(b)(6) included language only to provide an opportunity for judicial review to applicants and to persons who participated in the comment process. 136 Cong. Rec. S16,941. Later, the Conference Agreement added the third category, explaining that it did so "to ensure that existing provisions of law governing the availability of such review are in no way limited by this title [Title V]."

Likewise, the Commonwealth's construction of § 502(b)(6) recognizes that all three categories overlap in their coverage. Certainly, the applicant is a person who

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[4] Congress had three concerns: (1) that appeals be had in state courts under state laws; (2) that Title V not limit avenues of appeal already provided by state law; and (3) that some degree of injury be required to appeal. Chafee-Baucus Statement of Senate Managers, S. 1630, THE CLEAN AIR AMENDMENTS OF 1990, reprinted in 136 Cong. Rec. S16,941 (daily ed. Oct. 27, 1990). The Statement (*id.* (emphasis added)) indicates § 502(b)(6) was intended to:

> make clear that judicial review of final actions by the permitting authority to issue or deny permits shall be *available in State court to anyone who could obtain such review under any applicable law.* This provision ensures that existing provisions of law governing the availability of review of final actions on permit applications are in no way limited, and that interested parties *who arguably are affected by permit decisions* are guaranteed their day in court.

also could obtain judicial review of that action as a participant in the comment process (second category) and under applicable law (third category). That fact does not make nullities of the first and second categories. Similarly, the second category does not become a nullity because the person identified there, under the Commonwealth's construction, is a "person who could obtain judicial review of that action under applicable law." The judicial review provision was simply written as it is in order not to preclude existing avenues of appeal.[5]

III.

EPA UNDERSTATES THE COERCIVE NATURE OF THE SANCTIONS AND OTHER MEASURES EMPLOYED IN THE CHALLENGED STATUTORY SCHEME TO UNCONSTITUTIONALLY FORCE COMPLIANCE BY THE STATES

In its Brief, EPA gives the mistaken impression that the penalty provisions of the challenged CAA scheme are of slight consequence.[6] It does so by ignoring certain

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[5] EPA and Intervenors join the Court of Appeals (Petition, App. at 21-22) in supporting their own incorrect interpretations of Virginia's standing statute (Va. Code § 10.1-1318(B)) by citing old and inapposite cases. EPA Br. at 10 n.8; EDF Br. at 4 n.4 & 5 n.5; Int. Br. at 5 n.5. For example, *Citizens for Clean Air v. Commonwealth*, 412 S.E.2d 715 (Va. App. 1991) was decided under the predecessor of § 10.1-1318(B). As the Commonwealth pointed out below, that statute was amended extensively in 1993 in an effort to accommodate § 502(b)(6). *Fries v. Virginia State Water Control Bd.*, 409 S.E. 2d 634 (Va. App. 1991) and *EDF v. State Water Control Bd.*, 404 S.E.2d 728 (Va. App. 1991) were decided under a different substantive law, the Virginia Water Control Act, which contained a judicial review provision similar to the earlier version of § 10.1-1318(B) and thus unlike the one at issue here.

[6] EPA does so, for example, by calling the CAA sanctions "so-called 'sanctions'." However, it was Congress, not Virginia,

salient factors that are crucial to the Tenth Amendment and Spending Clause analyses, and by incorrectly analyzing the sanctions separately and not cumulatively.

A.

In addressing the constitutionality of the highway funding and approval sanctions under the Tenth Amendment, EPA ignores the "federal approval" component which punishes noncomplying States by denying them needed federal approvals – *not just funds* – for highway construction projects, even those solely state financed. CAA § 179(b)(1) (42 U.S.C. § 7509(b)(1)) (Petition, App. at 74-75). Thus, not only would the Commonwealth lose federal highway construction funds, it would be precluded from undertaking significant state projects that require federal approvals. Petition at 4-5.

EPA also inappropriately makes light of the absolute block on federal funds for building roads in nonattainment areas. EPA Br. at 5, 23. If sanctioned, the Commonwealth could not, as EPA suggests, receive *all* of the federal funds earmarked for Virginia simply by taking on exempt projects or by shifting funds for use in other areas of Virginia. First, the endangered federal highway funds are designated for road-building projects – projects planned years in advance and approved by the federal government for those purposes alone. Restructuring Virginia's highway construction program to include only exempt projects would require additional years of planning and approvals.

Second, even if possible, restructuring would be impractical because it would not address the Commonwealth's needs. Virginia plans for and the federal government approves the Commonwealth's projects because they are essential to meeting the ever increasing demand on Virginia's highway system. Shifting funds to pay for

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that labeled these penalties "sanctions." 42 U.S.C. § 7509 (Petition, App. at 74-75).

buses, to build commuter parking lots, or to build roads in less travelled areas outside nonattainment areas would not address Virginia's highway needs. For these reasons, EPA's characterization of the sanctions' impact is inconsistent with the realities of transportation planning and funding.

In addition, EPA has misconstrued Virginia's argument regarding the economic impact of the highway sanctions. EPA Br. at 27. Unlike *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), the impact from the sanctions would be felt by the States as States: the States directly suffer an economic impact from the loss of millions of federal dollars. *Hodel* is neither relevant nor controlling here because it involved a claim of an *indirect* economic impact on a State from a direct impact on private entities within that State.

In response to the Commonwealth's assertion that the CAA's civil and criminal enforcement authority in § 113 is an important component of the Act's coercive scheme, EPA addresses §§ 113(a)(3) and (b) for the first time. EPA Br. at 21 & n.15. Citing two decisions holding that the CAA did not provide EPA with authority directly to compel States to adopt certain CAA programs, EPA claims that State implementation and/or enforcement of a federal Title V permit program is not an "enforceable 'requirement' under Section 113." But those cases – neither of which were decided on constitutional grounds – were later vacated by the Supreme Court, in light of EPA's unwillingness to argue that it indeed had that authority. *EPA v. Brown*, 431 U.S. 99 (1977). But, at EPA's urging, Congress subsequently amended the Act in 1977 expressly to ensure that EPA could use § 113 to require States to implement federal programs. See Petitioners' Reply Brief filed below, at 10-11.

Elsewhere EPA quotes from *Pennsylvania v. EPA*, 500 F.2d 246, 261 (3d Cir. 1974), to the effect that States "can be required [by EPA] to take affirmative actions" to address air pollution within their borders. EPA Br. at 24 n.17. The dispute in that case was whether EPA could

constitutionally apply § 113 enforcement mechanisms to the State. After first reviewing the legislative history and concluding that "Congress clearly contemplated that states could be required to implement a transportation control plan" (*id.* at 259), the Third Circuit held that the Commerce Clause (and, implicitly, the Tenth Amendment) did not prohibit EPA's use of § 113 to "require the Commonwealth to enforce [EPA's] transportation control plan." *Id.* at 257. The 1977 amendments simply codify the Third Circuit's holding and overrule the two cases cited by EPA.

Thus, EPA's assurances regarding the use of § 113 to coerce States into enforcing a federal regulatory program ring hollow.

B.

In opposing the Commonwealth's Spending Clause argument, EPA – like the Court of Appeals below – places mistaken emphasis on a line of Spending Clause decisions standing for the unremarkable and uncontested proposition that Congress may condition the receipt of federal grant funds on the recipient's compliance with federal directives. EPA Br. at 22-26 & n.16 (citing, *e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).[7] Instead, the relevant cases here concern Congressional attempts to deny federal funding to States unless they legislate, implement, and enforce certain other public policy objectives. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (enacting mandatory drinking age requirement as a condition on federal highway funds). In such cases, the Court has expressed two primary concerns, both of which are implicated here: First, there must be some reasonable relationship between the condition imposed and the purpose of the federal monies; and second, the result of noncompliance cannot be so draconian as to leave States without any real choice.

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[7] Virginia has challenged none of the CAA grant programs.

The issue here is whether the condition imposed by the CAA – that States implement a Title V program for *stationary* sources of air pollution – is reasonably related to the purpose of highway construction.[8] As the Commonwealth explained in its Petition at 27-30, there is no reasonable relationship. Furthermore, the effect of highway construction on air quality is of no consequence to this analysis. The Commonwealth has already explained, in the Petition and in section III.A above, why its attempt to minimize the coerciveness of the highway funding sanction ultimately fails. And EPA never addresses how the denial of such funds – even if reasonably related to achieving Title V's goals – is reasonably related to a State's adoption of a Title V permit program once a federal program is imposed in that State (which presumably would satisfy Congress' lawful objectives).[9]

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[8] EPA also misses the point in footnote 19 (EPA Br. at 25-26) regarding the federal government's approval of state highway construction projects. In deciding to fund state highway construction projects, the federal government approves projects only if it determines that they conform to federally approved state air pollution control plans (called State Implementation Plans (SIPs)), *i.e.*, that they will not increase pollution beyond that allowed in the SIPs. Thus, there is no need to withhold federal funding to control air pollution because the conformity process already deals with that issue. This is especially true given that Title V operating permit programs are not SIPs and they are not designed to impose additional limitations on emissions (Petition at 28 n.15).

[9] EPA attempts to address this argument in the context of the Tenth Amendment claim, but ends up simply agreeing with the Commonwealth's assertion that the only remaining purpose for the continuation of these sanctions is to force the States to take over for EPA by adopting their own State program. To the extent EPA argues that continuation of sanctions is necessary to ensure State "cooperation" in implementing a federal program, they ignore the essential point that, under the statutory scheme, no amount of cooperation – except for adoption of a State plan – would end the imposition of sanctions on that State.

Thus, this Petition raises a novel issue not addressed by *Dole* or, as far as can be determined, any subsequent cases. In *Dole*, Congress used its authority under the Spending Clause to implement a public policy it did not have the authority to implement directly. But here, there is no doubt Congress could impose a federal permit program identical to a state Title V program. This Court must now decide whether Congress can use its Spending Clause power to coerce States into regulating on its behalf. *Dole*, in light of *New York v. United States*, 505 U.S. 144 (1992), must be read to proscribe these coercive sanctions.[10]

IV.

CONCLUSION

This case presents a question of critical national importance: whether Congress, frustrated by the nature and pace of air quality improvements, can force the States to implement a burdensome federal program under pain of severe and disproportional sanctions that remain in place until the States comply. The severity of the sanctions and other enforcement measures makes it indisputable that Congress designed the challenged statutory scheme to ensure that States, not EPA, run the federal

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[10] EPA also misconstrues the Commonwealth's argument regarding the offset sanction. At page 27 of its Brief, EPA incorrectly analyzes the offset sanction under *Dole* and the Spending Clause. As the Commonwealth explained, the offset sanction violates the Tenth Amendment (not the Spending Clause) because, in concert with the other components of the challenged statutory scheme, its overriding and unlawful purpose is to coerce States into compliance, thus magnifying the pressure on those States. Petition at 21. Furthermore, EPA ignores the critical fact that it is the Commonwealth – not EPA – who must impose the offset sanction on regulated entities seeking construction permits. Petition at 5 n.2.

program. The sanctions go beyond inducement, and punish States rather than improve air quality. This Court must decide whether Congress can simply avoid the cost and inconvenience of establishing another federal program by forcing States to become mere instrumentalities of the federal government.

Respectfully submitted,

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